

**THE PROMISE OF THE AFRICAN COURT OF JUSTICE AND
HUMAN AND PEOPLES' RIGHTS FOR THE PROTECTION OF
HUMAN RIGHTS IN AFRICA**

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I hereby declare that I have read and understood the regulations governing the submission of dissertations including those related to length and plagiarism, as contained in the rules of this University, and that this dissertation paper conforms to those regulations.

Signed at Cape Town on this the 25th day of MAY 2013

Signature_____

DEDICATION

This study is dedicated to my wife and children for their love and support.

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ABBREVIATIONS

ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights(Merged Court)
ACJHPR	African Court of Justice and Human and Peoples’ Rights (Draft Amended Merged Court)
AEC	African Economic Community
AIO	African Intergovernmental Organisations
ANHRI	African National Human Rights Institutions
AU	African Union
EC	European Commission
ECOWAS	Economic Community of West African States
EU	European Union
ECHR	European Court of Human Rights
I-ACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
OAU	Organisation of African Unity
OHCHR	Office of the High Commission for Human Rights
NEPAD	New Partnership for African Development
NGOs	Non-Governmental Organisations
RECs	Regional Economic Communities
SADC	Southern African Development Community

UDHR	Universal Declaration of Human Rights
UNHRC	United Nations Human Rights Council

OTHER ABBREVIATIONS

African Charter	African[Banjul] Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
African Human Rights Protocol	Protocol to the African Charter on Human and Peoples' Rights
African Human Rights Court	African Court on Human and Peoples' Rights
Constitution of the Republic of South Africa, 1996	South African Constitution
Draft Amending Merged Court	African Court of Justice and Human and Peoples' Rights
Merged Court	African Court of Justice and Human Rights
Merged Court Protocol	The Protocol of the African Court of Justice and Human Rights
Merged Court Statute	The Statute of the African Court of Justice and Human Rights
African Human Rights Protocol	Protocol to the African Charter on Human and Peoples' Rights
Court of Justice Protocol	Protocol to the Court of Justice of the African Union
Draft Amending Merged Court Protocol and Statute	Draft Protocol on Amendments to the Protocol on the Statutes of the African Court of Justice and Human and Peoples' Rights

Chapter One

INTRODUCTION

1.1 Background to the study

The protection of human rights was not given priority during the period when African States fought to be independent from colonial rule.¹ Africa's first inter-governmental organisation, the Organisation of African Unity (OAU), merely referred to human rights under the banner of the Universal Declaration of Human Rights (UDHR) in its founding instrument, the Organisation of African Unity Charter (OAU Charter).² This union of States was focused on the 'right to self-determination of peoples in the context of decolonisation and apartheid and not on human rights'.³

The OAU Charter, adopted by African States on 25 May 1963, did not contain provisions for the implementation and protection of human rights through an African human rights instrument or mechanism. It was not until 1981 that human rights were given African recognition through the adoption of the African [Banjul] Charter on Human and Peoples' Rights (African Charter).⁴ This instrument provides for the establishment of bodies to promote and protect human and peoples' rights,⁵ the most noteworthy of which is the African Commission on Human and Peoples'

¹G J Naldi *The African Union and the Regional Human Rights system* (The African Charter on Human and Peoples Rights 2nd The System in Practice, 1986–2006 M Evans & R Murray eds.) Cambridge University Press 2008 p.45. F Viljoen & E Baimu *Courts for Africa: Considering the co-existence of the African Court on Human and Peoples' Rights and The African Court of Justice* Netherlands Quarterly of Human Rights 2004 22(2) at p.245.

²OAU Charter adopted on 25 May 1963 in Addis Ababa, Ethiopia. The Preamble of the OAU Charter paragraph 9 states: Persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among States. Article II(e) reads: 'To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'.

³M Du Plessis & L Stone (2007) A court not found? *African Human Rights Journal* 7 (2) at p.526.

⁴African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3rev.5, 21 I.L.M.58 (1982), entered into force 21 October 1986. The International Commission of Jurists (ICJ) after the first African States became independent adopted a declaration on human rights with a court in January 1961 in Lagos, Nigeria. However, nothing came of it until 1981. See G Baricako 'The African Charter and African Commission on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter and Peoples' Rights* 2nd Ed. The System in Practice, 1986–2006 (2008) at p.1.

⁵See note 4 above African Charter; Preamble par.2 recalling Decision 115(XVI) of the Assembly of Heads of States and Governments at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 29 July 1979 on the preparation of a 'preliminary draft on an African Charter on Human and Peoples' Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights'.

Rights(African Commission).⁶The African Charter is inspired by the UDHR and influenced by traditions and values of the African Society.⁷

Embodied in this instrument is the African Commission, which emulates the United Nations Commission on Human Rights (United Nations Commission).⁸The United Nations Human Rights Council (UNHRC) later succeeded the United Nations Commission.⁹ The African Commission is mandated to promote human and peoples' rights and to interpret the provisions of the African Charter.¹⁰ Its role is largely investigative¹¹ and to make recommendations¹² on its findings on human rights violations communicated to the African Commission. Compliance with the

⁶See note 4 above African Charter: Art. 30 'An African Commission on Human and Peoples' Rights, hereinafter called 'the Commission', shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa'.

⁷The Universal Declaration of Human Rights was adopted by the United Nations General Assembly at Palais De Chaillot, Paris on 10 December 1948. Adopted and proclaimed by General Assembly Resolution 217A(iii) of 10 December 1948. The preamble to the UDHR reads: 'The General Assembly proclaims this Universal Declaration as a common standard of achievement for all peoples and all nations ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international to secure their universal and effective recognition and observance both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.' <http://www.un.org/en/documents/udhr/> (accessed 09/10/2012). Also see note 1 above, Naldi at p.25.

⁸The Commission on Human Rights of the United Nations adopted a resolution during its 34th Session in 1978, calling on the Secretary General of the United Nations 'to consider the possibility of providing the OAU with all necessary assistance with a view to facilitating the establishment of a Commission on Human Rights for Africa' UN Resolution CHR, Res.24 (XXXIV) of 8 March 1978. The UN General Assembly organised a seminar in Monrovia, Liberia on the creation of a regional human rights commission in particular for Africa during September 1979. See note 4 above Baricako at p.4–5. Also see M Mutua 'The African Human Rights System' A Critical Evaluation (2000) p.18. <http://www.hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (accessed 14/01/2012).

⁹The United Nations General Assembly established the UNHRC by adopting resolution A/RES/60/251 on 15 March 2006. The UNHRC is mandated to uphold the highest standards in the promotion and protection of human rights. The UNHRC adopted Res.5/1 on June 18 2007, to establish a Complaints Procedure to address the consistent patterns of gross violations of all human rights and all fundamental freedoms. The Complaints Procedure consists of two working groups, namely: the Working Group on Communications (WGC) and the Working Group on Situations (WGS). The UNHRC also employ Special Procedures as a mechanism to monitor human rights violations in specific countries or examine global human rights issues. These special procedures may comprise of individual experts called Special Rapporteurs, Special Representatives or Independent Experts or Working Groups. <http://www.ohchr.org/English/bodies/chr/complaints.hmt> (accessed 26/02/2012). See note 8 above Mutua at p.15.

¹⁰See note 4 above African Charter, Art. 45 '(1)To promote Human and Peoples' Rights.... (2) To ensure the protection of human and peoples' rights.... (3) To interpret all provisions of the ...Charter...'

¹¹See note 4 above Art. 46 'The Commission may resort to any appropriate method of investigation...'. See R Murray 'The Special Rapporteurs in the African System' *The African Charter on Human and Peoples' Rights 2nd ed. The System in Practice, 1986–2006* M Evans & R Murray (eds.) p.344. Also see B T M Nyanduga 'Working Groups of the African Commission and their Role in the Development of the African Charter on Human and Peoples' Rights' *The African Charter on Human and Peoples' Rights 2nd ed. The System in Practice, 1986–2006* M Evans & R Murray (eds.) p.379.

¹²See note 4 above Art. 53: 'While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful'.

recommendations on its findings is not binding on the State Party, and there is no enforcement mechanism.¹³

This fact has been the reason for severe criticisms of the African Commission by observers of African human rights.¹⁴ The African Commission is branded as a ‘toothless bulldog that only barks but cannot bite’¹⁵ by Udombana, while Peter argues that ‘[t]his commission has proved to lack any bite let alone a bark that is noticeable’.¹⁶ Mutua finds the African Commission to be a disappointment, ineffectual, weak and impotent.¹⁷ Wachira does not agree with these criticisms and argues that States are bound in terms of international treaty norms to comply with the provisions of the treaty.

It was hoped that the African Charter would have followed the European and Inter-American human rights systems in the establishment of a court with power to bind human violators to its judgments and impose an obligation on the countries concerned to comply with them.¹⁸ This was done 23 years after the African Charter was adopted, when the African Human Rights Court was entered into force. This court from its very inception was on a shaky foundation when the African Union (AU)¹⁹ decided to merge the court with the AU’s own judicial organ, the Court of Justice. The structure of this merger is the subject of the thesis.

¹³ See note 8 above Mutua at p.20. See note 1 above Naldi p.36.

¹⁴ See note 1 above Naldi at p.25.

¹⁵ N J Udombana Towards the African Court on Human and People's Rights: Better Late than Never, *Yale Human Rights & Development Law Journal* (2000).

¹⁶ C M Peter ‘The proposed African Court of Justice-Jurisprudential, Procedural, Enforcement Problems and Beyond’ p.122. *East African Journal of Peace & Human Rights* Vol 1(2) 1993.

¹⁷ See note 8 above M Mutua general. Also see S Scaats *Africa’s New Human Rights Court: Whistling in the Wind?* 2009 p.4. www.chathamhouse.org (accessed 14/01/2012).

¹⁸ The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) establishes the European Court of Human Rights based in Strasbourg. The European Convention is the oldest regional instrument on human rights. It was adopted by the Council of Europe on 4 November 1950 in Rome and entered into force: 3 September 1953. Art. 19 established a European Commission on Human Rights (European Commission) and a European Court of Human Rights. The European Commission was made obsolete in 1998 with the restructuring of the Court of Human Rights. http://www.hrea.org/index.php?doc_id=365 (accessed 27/10/2011). The American Convention on Human Rights (Pact of San Jose’) adopted by the Organization of American States on 27 November 1969, San José, Costa Rica. Entered into force: 18 July 1978. Art. 33 establishes the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

¹⁹ The African Union was established in Addis Ababa (Ethiopia) on 26 May 2001 and adopted in South Africa on 9 July 2002. See also note 41. On 9 September 1999 the Assembly of Heads of States and Governments of the OAU called for the establishment of the AU in what became known as the Sirte Declaration. See note 39.

1.2 The need for a Human Rights Court

The African Human Rights System consists of the African Charter and the African Commission as the mechanisms entrusted with the task of promotion and protection of human and peoples' rights. Included in this system is the Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (entered into force in 1974); the African Charter on the Rights and Welfare of the Child of 1990 (entered into force in 1999); the Cultural Charter for Africa of 1976 (entered into force in 1990);²⁰ and the Protocol to the African Charter on the Rights of Women in Africa of 2003 (entered into force in 2005).²¹ However, between 1986 and 2004, Africa did not have a continental Human Rights Court. In 2004 the OAU adopted the Protocol to the African Charter on Human and Peoples' Rights (African Human Rights Court Protocol) on the Establishment of an African Court on Human and Peoples' Rights²² (African Human Rights Court).

The African Commission was the only mechanism to which human rights violation complaints could be addressed. In terms of the African Commission's mandate, it is empowered to make recommendations to the violating State Party which are not enforceable or binding on State Parties, as mentioned above.²³

The consensus amongst African human rights observers is that the African Commission does not provide for the enforcement remedies or mechanism for encouraging and tracking States compliance with its findings or recommendations. This has contributed to the African Commission's ineffectiveness.²⁴ Wachira, on the other hand, argues against this general sentiment of non-compliance with regard to

²⁰ C Heyns 'The African Regional Human Rights System: The African Charter' *Penn State Law Review* [Vol 108:3 2004] p.683. Cambridge: Cambridge University Press 2008. See note 3 above. See also note 1 Viljoen & Baimu at 246.

²¹ F Banda Protocol to the African Charter on the Rights of Women in Africa Cambridge: Cambridge University Press 2008 p.441; Also see J C Mubangizi 'Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and the gains' (2006)6(2) *African Human Rights Law Journal* at pp.148 & 157.

²² The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights was adopted in Ouagadougou, Burkina Faso on 9 June 1998 – entered into force on 25 January 2004. To date 51 of the 53 African States are signatories. Cape Verde and Eritrea are not signatories yet. Of the 51 signatories only 26 States have deposited their instrument of ratification.

²³ O C Okafor 'The African Rights Systems: Activist Forces and International Institutions.' Cambridge University Press (2007) p.78; G M Wachira 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006)6(2) *African Human Rights Law Journal* pp.473 & 487. See also note 21 above Mubangizi at p.148; J D Boukongou 'The appeal of the African system for protecting human rights' (2006)6(2) *African Human Rights Law Journal* at pp.277 & 291.

²⁴ See note 8 above Mutuap.25.

the African Commission's recommendations and rulings by making a case that the States are bound by the nature of the treaty to which they are signatories. He argues that 'states are bound to respect and implement them in view of the principle of *pacta sunt servanda* under the Vienna Convention on the Law of Treaties²⁵ and article 1 of the African Charter'.²⁶

The importance of enforceable and binding decisions as opposed to recommendations is that State Parties can be held accountable for non-compliance and attract sanctions of some form as determined by the court or political institution under whose jurisdiction the State Party falls.

The need for a Human Rights Court is conclusive, as argued by African human rights observers, in that human rights violators can be 'brought to book', be bound by the decision of the court, and be held accountable for non-compliance. Mutua, however, argues that 'the mere addition of a court is unlikely by itself to address sufficiently the normative and structural weaknesses that have plagued the African human rights system since its inception'.²⁷ While this may be a valid point, it is not insurmountable and can be addressed. This does not deviate from the indisputable fact that a Human Rights Court is necessary for the protection and promotion of human rights in Africa, and to bind violators legally to comply with the findings of the court. The non-compliance provision of the African Commission's recommendations is proof that it is not possible to compel violating States to conform to internationally acceptable human rights norms, and to provide compensation to victims. Another factor is that international human rights jurisprudence would be developed by the establishment of a continental Human Rights Court. This would be a beacon to guide regional and national Human Rights Courts, tribunals and forums. As an example, the Constitution of the Republic of South Africa, 1996 (South African Constitution)²⁸ enshrines a Bill of Rights that

²⁵ Vienna Convention on the Law of Treaties 1969 done at Vienna on 23 May 1969, entered into force on 27 January 1980. See note 111.

²⁶ See note 23 above Wachira general.

²⁷ M Mutua 'The African Human Rights Court: A Two Legged Stool?' (1999) 21 *Human Rights Quarterly* 342.

²⁸ Promulgated originally as Act 108 of 1996; renamed (together with all its amendment Acts promulgated at that point) by s. 1(1) of the Citation of Constitutional Laws Act 5 of 2005 effective 27 June 2005.

empowers and obliges a court, tribunal or forum, when interpreting the Bill of Rights, to consider international law.²⁹

The OAU recognised this need and established the African Human Rights Court, although it took years to come into force. The AU observed the continuance of the established African Human Rights Court but within a different format. This format is under scrutiny in this thesis. The path to the human rights court as proposed by the AU will be plotted by looking at the transition of the African continental courts.

1.3 First African continental court - African Court on Human and Peoples' Rights

In 1993 the General Secretary of the OAU, Salim Ahmed Salim, stated that the time had come for an African Court on Human Rights to be established.³⁰ The Assembly of Heads of State and Government of the OAU adopted a resolution in June 1994 at Tunis in Tunisia requesting the Secretary General to convene a Government of Experts' meeting in conjunction with the African Commission, over the means to enhance the efficiency of the African Commission, and to consider in particular the establishment of an African Human Rights Court.³¹ A draft Protocol was submitted to a meeting of government experts in Cape Town, South Africa in September 1995, and adopted at a meeting of Ministers of Justice in December 1997. The final draft was adopted in Burkina Faso in June 1998. This was followed by the adoption of a declaration by the first OAU Ministerial Conference on Human Rights in April 1999 in Grand Bay, Mauritius. The Grand Bay Declaration affirmed that the promotion and protection of human rights are matters of priority in Africa, and acknowledged that 'the observance of human rights is a key tool for promoting collective security, durable peace and sustainable development' in Africa. The conference recommended that 'States formulate and adopt national action plans for the promotion and protection of human rights'. At the conference, it was requested that States 'give consideration to the ratification of all major OAU human rights treaties, including UN Human Rights Conventions'.³² The establishment of the African Human Rights Court caused observers of the African human rights system to comment on its

²⁹ South African Constitution Bill of Rights Section 39(1). 'When interpreting the Bill of Rights, a court, tribunal or forum ... (b) must consider international law'.

³⁰ See note 23 above Wachira at p.7.

³¹ See note 4 above African Charter Preamble.

³² African Commission on Human and Peoples' Rights Grand Bay Declaration. http://www.achpr.org/English/declarations/declaration_grand_bay_en.html (accessed 03/10/2011).

mandate to protect and promote human rights. Matua believes that the African Human Rights Court is an attempt to address some of the weaknesses of the African system,³³ and argues that unless State Parties revisit the African Charter on Human Rights and strengthen many of its substantive provisions, '[t]he African Human Rights Court is condemned to remain a two-legged stool'.³⁴

Not all African human rights observers or organisations share this view.³⁵ The Association for the Prevention of Torture (APT) believes that the adoption of the Protocol is an important step in building up the African system for the protection of human rights.³⁶ Wachira commented that '[a]lthough member states of the OAU had yielded and accepted that an African Court on Human and Peoples' Rights was a prerequisite to an effective human rights protection mechanism, they remained guarded and they were equally determined to frustrate its functioning'.³⁷

The African Human Rights Court is a positive step for the protection and promotion of human rights. The broad interpretation of the African Charter by the African Commission has addressed many of the concerns raised by African human rights commentators and has provided the third leg to stabilise the African Human Rights Court. The recommendations made by the African Commission over the years have evolved to the extent that observers of African human rights have commented that 'the Commission has contributed to the emergence of a dynamic and objective conception of the African law of human rights'.³⁸ The African Human Rights Court is the only continental Human Rights Court in operation, and as such must be supported by the AU and States alike to be effective in the promotion and protection of human rights until the coming into force of the AU structured court.

1.4 Second African continental court –Court of Justice of the African Union(Court of Justice)

³³ See note 8 above Mutua at p.26.

³⁴ See note 8 above Mutua at p.39.

³⁵ See note 23 above Okafor at p.78.

³⁶ Occasional Paper: The African Court on Human and Peoples' Rights, Association for the Prevention of Torture 2000 <http://www.apr.ch> (accessed 17/06/2012). The APT is an international NGO based in Geneva, whose mandate is the prevention of torture and other cruel, inhuman or degrading treatment and serious human rights violations in general. APT holds a consultative status with ESCOSOC of the UN and with the Council of Europe, observer status with the African Commission on Human and Peoples' Rights.

³⁷ See note 23 above Wachira at p.13.

³⁸ See note 23 above Boukongou at p.277.

The challenges posed by globalisation and the need to promote the socio-economic development of Africa convinced the OAU to disband in favour of a new organisation.³⁹ The AU was constituted in order to replace the OAU and to take up the multifaceted challenges that confront Africa and its peoples in light of the social, economic and political changes taking place globally.⁴⁰ The founding instrument of the AU, the Constitutive Act of the African Union⁴¹ (Constitutive Act), in contrast, includes the protection and promotion of human rights in its preamble and objectives, while the OAU Charter does not, as mentioned earlier. Sonia Sceats aptly observes that the Constitutive Act ‘represents an almost seismic shift since the days of its predecessor body, the Organisation of African Unity, which was committed to non-interference in the internal affairs of states and rarely engaged with human rights issues’.⁴²

The Constitutive Act provides for the establishment of a Court of Justice.⁴³ The Protocol of the Court of Justice of the African Union⁴⁴ (Court of Justice Protocol) declared this court to be the principal judicial organ of the AU.⁴⁵ The Constitutive Act makes mention of the African Charter in its Objectives, Article 3(h). The already established African Human Rights Court is not mentioned in the Constitutive Act. The sources of law to which the Court of Justice may have regard in Article 20 of the Court of Justice Protocol do not include the African Charter. There is no mention of a relationship between the Court of Justice and the African Human Rights Court in the Court of Justice Protocol. However, the Assembly of the AU may indirectly confer power on the Court of Justice to have jurisdiction over human rights violations.⁴⁶ The Court of Justice has 43 State signatories of the potential 54 African

³⁹ The Heads of States and Government issued a declaration on 09/09/1999 calling for the establishment of the African Union, the Sirte Declaration. <http://www.au.int/en/> (accessed 22/10/2012).

⁴⁰ See note 15 above Udombana at p.853.

⁴¹ The Constitutive Act of the African Union adopted in Lome, Togo on 11 July 2000, entered into force on 26 May 2001 with all 54 African States as signatories and 54 instruments of ratification being deposited. <http://www.achpr.org> (accessed 03/10/2011). The 54th State is South Sudan.

⁴² See note 17 above Sceats at p.3. See also note 1 above Viljoen & Baimu at p.247; see also the Constitutive Act Preamble and Arts. 3 and 4.

⁴³ See note 44 Constitutive Act Art. 5(1)(4).

⁴⁴ Adopted by the 2nd Ordinary Session of the Assembly of the African Union in Maputo on 11 July 2003. 43 of 54 States are signatories and 16 States have deposited their instruments of ratification. <http://au.int/en/treaties> (accessed 18/10/2012).

⁴⁵ See note 44 above Court of Justice Protocol Art. 2(2) The Court shall be the principal judicial organ of the Union.

⁴⁶ See note 44 above Court of Justice Protocol Art. 19(2) The Assembly may confer on the Court power to assume jurisdiction over any dispute other those referred to in this Article.

States.⁴⁷ As at 18 October 2012 only 16 State Parties had deposited their instruments of ratification, but nonetheless this sufficed for the Treaty to be entered into force.⁴⁸ The Court of Justice is currently in a state of limbo and the appointment of judges to the court has been suspended pending the outcome of the proposed merged court.

1.5 Third African continental court–African Court of Justice and Human Rights(Merged Court – CJHR)

The Court of Justice and the African Human Rights Court were merged to establish the Court of Justice and Human Rights⁴⁹(Merged Court). The Merged Court is structured to consist of two Sections, General Affairs and Human Rights. The Merged Court Protocol and Statute has not received the required number of ratifications to be entered into force at the time of writing of this thesis.

It was during the deliberations on the draft Court of Justice Protocol that it was first mooted that the African Human Rights Court be integrated as a special chamber of the Court of Justice. This was rejected by the Executive Council of the African Union, who decided that ‘the African Court on Human and Peoples’ Rights shall remain a separate and distinct institution from the Court of Justice of the African Union’.⁵⁰ As referred to above, this changed in 2004 and will be more fully addressed in the following chapter when the reason for the merger is examined.

⁴⁷ Sudan has been divided into two South Sudan and Sudan thus increasing the number of African States from 53 to 54 with effect from 15/08/2011.

⁴⁸ See note 44 above Court of Justice Protocol Art. 60. This Protocol shall enter into force 30 days after the deposit of the instruments of ratification by 15 Member States.

⁴⁹ The Protocol on the Statute of the African Court of Justice and Human Rights adopted by the 11th Ordinary Session of the Assembly of heads of State and Government, held in Sharm El-Sheikh, Egypt on 1 July 2008 <http://au.int/en/treaties> (accessed 18/10/2012). To date only 27 States are signatories with four States depositing their instruments of ratification.

⁵⁰ I Kane & AC Motala ‘The Creation of a New African Court of Justice and Human Rights’ – The African Charter on Human and Peoples’ Rights M Evans & R Murray eds. Cambridge University Press 2008 at p.413 for a general overview of these proceedings.

1.6 Fourth African continental court –African Court of Justice and Human and Peoples’ Rights: Draft Amending Merged Court (Tri-Sectional Court) (ACJHPR)

Government experts and members of justice met in Addis Ababa, Ethiopia in May 2012 to discuss the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights(Draft Amending Merged Court Protocol and Statute). This instrument provides for the change of the name of the African Court of Justice and Human Rights to the African Court of Justice and Human and Peoples’ Rights⁵¹(ACJHPR). The significant amendments include the Court’s jurisdiction, which is described as a court of first instance and of appeal.⁵² The ACJHPR is vested with international criminal law jurisdiction and includes crimes of genocide, crimes against humanity, war crimes, crimes of unconstitutional change of government, piracy, terrorism, mercenary practices, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous waste, illicit exploitation of natural resources, and aggression.⁵³The Draft Amending Merged Court Protocol and Statute further provides for judges to be elected on a full-time basis, with the court being structured into three Sections, the General Section, the International Criminal Law Section, and the Human and Peoples’ Rights Section.⁵⁴The Draft Amending Merged Court Protocol and Statute attempts to rectify the lacunae in the Merged Court Protocol and Statute by including the following clauses: the relationship between the African Commission and the Merged Court,⁵⁵ definition clause and amendment clauses to the Protocol.⁵⁶An addition in the Statute of an ‘equitable gender representation’ clause in the composition of the Court was made.⁵⁷ A striking feature of the Draft Amending Merged Court Protocol and Statute is that the number of judges remains the same as in the Merged Court Protocol and Statute, but only five will be appointed to the Human Rights Section, and not eight as originally provided for.⁵⁸ Access to the court with regard to individuals and non-governmental organisations is restricted to only African individuals and African

⁵¹ Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Revised 15 May 2012 Art. 8.

⁵² See note 51 above Art. 3.

⁵³ See note 51 above Art. 28A.

⁵⁴ See note 51 above Art. 16.

⁵⁵ See note 51 above Art. 4.

⁵⁶ See note 51 above Art.12.

⁵⁷ See note 51 above Art. 3(4).

⁵⁸ See note 51 above Art. 4.

organisations with observer status with the AU or its organs or institutions. The ratification of State Parties is still a requirement for direct individual access to the Merged Court.⁵⁹

1.7 Conclusion

The plotting of the four African courts demonstrates the uncertainty of the AU's plans to find the right format for the final African Human Rights Continental Court. At present, the African Human Rights Court is the only continental court in operation. The Court of Justice is in limbo, while the other two courts wait in the wings. The continued existence of the African Human Rights Court and the Court of Justice in their present form will come to an end as soon as one of the merged courts enters into force. This thesis discusses the enabling Protocols of the latter two courts, the Merged Court Protocol and the Draft Amending Merged Court Protocol and Statute against the backdrop of the African Human Rights Court Protocol, to determine the plight or advancement of the protection and promotion of human rights within the Merged Court structure.

1.8 Problem statement

This thesis investigates the promise of the African Court of Justice and Human and Peoples' Rights as the preferred judicial mechanism for the effective protection of human rights in Africa. The study seeks to find an answer to the question of which is the appropriate judicial structure to promote and protect African human rights in Africa. It is yet to be seen whether human rights will best be served by an independent Human Rights Court, or a court that is integrated with other facets of law such as that proposed by the Merged Court of the AU, or ultimately by the Tri-Sectional Court. The AU, while trying to find the right mix, has landed in a tangle with the possibility of two courts being adopted and operating concurrently before the finalisation of the proposed judicial forum. This thesis has a bias towards human rights and will analyse the proposed human rights court structures to determine the suitability of the judicial forum that will best protect and promote human rights in Africa.

The AU has placed itself in a peculiar position with regard to the establishment of a single continental court to preside over general issues, international crimes and

⁵⁹ See note 51 above Art. 16(f).

human rights.⁶⁰ This is unprecedented in international judicial systems, and specifically where human rights are integrated with international crimes. Since entered into force, the African Human Rights Court has metamorphosed into the Merged Court with two Sections, and before it can get off the ground, a Draft Amending Merged Court with three Sections is being proposed. The AU provides for each phase of the court to become operational separately. In addition the Court of Justice is presently in the position of accepting nominations for judges. The Merged Court Protocol and Statute has received 27 signatories and five ratifications.⁶¹ The African Human Rights Court Protocol received 51 of the possible 54 signatories and of these, 26 Member States deposited their instrument of ratification, entering it into force. In light of the aforementioned, the enabling instrument of the Merged Court must provide for the transition from the existing courts at the time of the merger into a single Merged Court. The AU has created a problem by breathing life into more than two judicial institutions from which it may take many years to recover. This could have a detrimental effect on the promotion and protection of human rights in Africa.

African States have unanimously accepted the AU and the African Human Rights Protocol. The same cannot be said when it came to ratifying the African Human Rights Court, although it is operational. Despite this, the AU has proposed the merger of the African Human Rights Court by accepting the reasons forwarded by some Member States. The AU must take cognisance of those reasons tabled and those against the merger, so as to gain the confidence of those States that remain undecided.

Observers of African human rights have warned that a danger exists in the African Human Rights Court being relegated to the periphery in the event that the merger is ratified.⁶² They identified areas of concern such as the AU's failure to consider the legal and political implications of the merger;⁶³ that the AU is not legally bound by the African Charter on Human Rights;⁶⁴ that only conditional access by civil society

⁶⁰ See note 51 above at Art. 5(1)(d).

⁶¹ African Union <http://www.au.int/en/treaties> (accessed 18/10/2012) The five States that ratified the Protocol are Libya & Mali in 2009 Burkina Faso in 2010 Benin & Congo in 2012.

⁶² See note 1 above Viljoen & Baimu at p.254.

⁶³ See note 50 Kane & Motala at p.414.

⁶⁴ See note 1 above Viljoen & Baimu at p.265.

organisations and individuals were provided for;⁶⁵ the relationship with the African Commission; gender equality in the composition of the Court;⁶⁶ and the relationship between the Courts of Justice and Human Rights and the courts of the regional economic communities.⁶⁷ The thesis will draw from these comments and analyse the Merged Court Protocol and Statute against the Draft Amending Merged Court Protocol and Statute to determine to what extent they have addressed the concerns raised so as to determine the suitability of the Merged Court as the appropriate mechanism to promote and protect African Human Rights.

A study of the Draft Amending Merged Court structure will be targeted against the backdrop of the African Human Rights Protocol and the Merged Court Protocol and Statute to determine to what extent the structure of the Merged Court provides for the protection and promotion of human rights. Secondly, in so doing, the study will answer the question on the implications of including the International Criminal Law Section, and the effect this would have on the promotion and protection of human and peoples' rights in Africa.

1.9 Research methodology and objectives

Primary analysis will be undertaken on key structural elements in the relevant enabling Protocol on the Statute of the African Court of Justice and Human Rights, and the proposed amendments to it, to confirm or dispel the promise of the African Court of Justice and Human and Peoples' Rights to protect human rights.

Secondly, it would be necessary to establish if such requirements have indeed been met in order to give effect to the amendments. This will be achieved by a study of the relevant provisions in the enabling instruments that provides for the merger of the courts into one mechanism and the procedures that need to be followed to make it possible against the backdrop of international treaty law.

⁶⁵ See note 49 above African Court of Justice and Human Rights Art. 30 of the Statutes ... (f) Individuals or relevant Non-Government Organisations accredited to the AU or to its organs, subject to the provisions of Art. 8 of the Protocol which reads at 8(3): 'Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or any time thereafter, make a declaration accepting the competence of the Court to receive cases under Art. 30(f) involving a State which has not made such a declaration'.

⁶⁶ See note 49 above Art. 5 of the Statute. Each State Party may present up to two(2) candidates and shall take into account equitable gender representation in the nomination process. The Court of Justice Protocol refers to adequate gender representation in Art. 5, and in Art. 7 reference is made to equal gender representation. The African Human Rights Court Protocol makes reference to adequate gender representation in the nomination process Art. 12 and adequate gender representation in the election process Art. 14.

⁶⁷ See note 50 above Kane & Motala at p.439.

With regard to African human rights, research on information provided by the African Union and the African Commission on the African Charter and the Constitutive Act, will be undertaken through use of their websites and the University of Cape Town's library. The study will draw upon the enabling treaty of the African Human Rights Court, as well as other international human rights instruments from the American and European Human Rights systems in order to acquire insight into the operation of those Human Rights systems.

Secondary desktop research will be undertaken on African Law websites of various institutions of learning and other organisations. Existing doctrinal literature on the various mechanisms created by the aforementioned instruments will be extracted when searching the Internet sites. Articles and journal publications of various academic writers and observers on the subject and reports from government and non-governmental organisations will be researched. Books published by African human rights observers, obtained from the UCT Law Library, will also be researched.

1.10 Literature review

Observers of the Human Rights systems have responded with arguments for and against the merger and have advanced their thoughts as to the structure the merger should embrace.

Kindiki⁶⁸ argues that there are two identifiable ways in which the merger could be achieved. The first is the integration of physical and financial resources. This mode of merger would require the sharing of all resources including the building and operational facilities such as libraries and information technology. However, Kindiki warns that this form of merger would not necessarily reduce operational costs or personnel by simply locating two separate courts in one building. What this form of merger does do is obviate the need to amend or abrogate the existing protocols to bring about the merger, as the two courts will remain independent, with separate registries operating from the same building.

The second mode of merger sees the complete fusion of the two courts and management into one unified court. This fusion entails having personnel including judges serving both mandates of the court: general and human rights agendas. The

⁶⁸ K Kindiki 'The proposed integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal difficulties and merits' (2007) 15(1) *African Journal of International and Comparative Law* 138 at p.140.

one drawback of this mode of merger is that it requires the amending of the existing protocols of the two courts and the likely disruption of the already operational African Human Rights Court. The advantage that this mode of merger offers, argues Kindiki, is that it would lead to great reduction of personnel and cost requirements. This mode of merger as presented by Kindiki is the preferred option. He goes further and recommends that the Human Rights Court should be subsumed into the Court of Justice to create a single court. In support of this, he reasons that the broad mandate of the Court of Justice includes the handling of human rights issues in terms of the objective and principles of the AU Constitutive Act. Furthermore, international law embraces human rights as a branch thereof and experts are required to have some knowledge of human rights. Finally, the different stages of development of the two courts can be surmounted by the political will of the Member States.

Viljoen and Baimu⁶⁹ argue that it makes sense to have one judicial body to mediate disputes arising from increasing political and regional co-operation. While they agree with Kindiki on the aspect of the broader mandate of the Court of Justice, they contend that unlike the African Human Rights Court, the Court of Justice does not have an explicit human rights mandate. This, they argue, poses the danger that if the African Human Rights Court is absorbed by the Court of Justice even as a chamber, human rights issues run the risk of being relegated to the periphery.

Other human rights observers such as Udombana⁷⁰ argue that the AU should establish a Court of Justice 'capable of addressing the myriad of problems confronting the continent'. In opposition to a merger of the two courts, he proposes that 'one court should give way for the other'. Udombana proposes that the Court of Justice be divided into three specialised chambers. To one chamber could be allocated general issues such as matters of international economic law. A second chamber would deal with human rights matters and a third chamber with environmental and international criminal law. Udombana supports his argument on the chamber system based on the structure of the International Court of Justice.

⁶⁹ See note 1 above Viljoen & Baimu. Viljoen and Baimu at an early stage observed that the mandate of the Court of Justice and that of the African Human Rights Court were different, in the sense that the former has a wide mandate with no explicit human rights mandate. The latter court has a more specialised mandate concerning the interpretation of the African Charter and application thereof together with any relevant human rights instrument ratified by the states.

⁷⁰ See note 15 above Udombana.

Boukougou⁷¹ holds a similar view to that of Udombana and envisages a court with three main Sections. He bases his structure of the court on the model of the International Court of Justice, with a Section dealing with general issues, such as disagreements between States; a Section on human rights, based on the model of the European Court of Human Rights; and a Section for criminal proceedings, based on the model of the International Criminal Court. This last Section, he argues, will address issues such as crimes against humanity, crimes of genocide, crimes of aggression, and war crimes. Boukougou argues that each of the Sections could have ‘functional autonomy, its own rules of procedure, its specialised chambers and its internal organisation in accordance with its mandate’. Furthermore, he argues that certain judges, according to their expertise, could preside over more than one Section.

While many observers of human rights tend to be in agreement with the concept of a merging of the two courts, there remain certain misgivings about the legal process followed by the AU in amending the existing protocols.

Kane and Motala were among the first to point to the failure of the AU to consider the legal and political implications of the proposed Merged Court.⁷² They have questioned the creation of the Merged Court from the time it was conceived.⁷³ In their critique on the decision to merge, they argue that the process of the merger is flawed in that it is not grounded on solid legal foundations. In support of this claim, they argue that the provisions in the two protocols for establishing these courts in terms of amendments to the protocols does not allow for the AU Assembly to propose and/or make amendments to these protocols, and questions the authority of the AU Assembly to amend or vary multilateral treaties in the manner envisioned (to amend the two protocols through the adoption of a new protocol).

Kindiki and Boukougou are in agreement with Kane and Motala in questioning the abrogation of one treaty by ratifying another treaty, where the State Parties to the two treaties are not the same.⁷⁴ The Draft Amending Merged Court Protocol and

⁷¹ See note 23 above Boukougou at p.297.

⁷² See note 50 above Kane & Motala; see also note 3 above du Plessis & Stone at p.539; D Juma ‘Lost, or Accrued in Transition? The Anatomy of the new African Court of Justice and Human Rights’ at p.2. Electronic copy available at: <http://ssrn.com/abstract=1394042> (accessed 10/12/2012).

⁷³ See note 50 above Kane & Motala at p.430.

⁷⁴ See note 68 above Kindiki at p.143; Sands P ‘Article 39 Convention of 1969 General rules regarding the amendment of treaties in The Vienna Conventions on the Law of Treaties. A Commentary’ Corten O & Klein eds. Oxford University Press 2011 963–977 at 968. The merger of treaties by means

Statute, argues Viljoen, is built on legal drift sand. Viljoen questions the legality of amending a protocol that is not in force.⁷⁵

There does not appear to be an abundance of literary discourse that addresses implications on the draft proposal to have the two chambers of the African Court of Justice and Human Rights transformed to a three chamber African Court of Justice and Human and Peoples' Rights. However, this new development by the AU will impinge on the study to determine structural issues surrounding the inclusion of the international crime chamber to the proposed Draft Amended Merged Court, and the promise thereof for the promotion and protection of human rights. In addition, this thesis will examine the concerns raised by political observers on the inclusion of an international crimes chamber to the court.

1.11 Structure of thesis

Chapter One introduces the study by chartering the direction of the African Human Rights System as planned by the AU to merge the African Human Rights Court with the Court of Justice. In so doing, the chapter points out the problem created by the AU in bringing into operation more institutions to compete for limited resources. Proliferation of courts is one of the reasons that the AU proffered for the merger, and yet it adds to the alleged problem despite the fact that it may not be a permanent situation. It also defines the merger structures argued by African human rights observers. Finally, Chapter One sets out the questions it seeks to answer in this thesis and how information will be gathered to achieve this to arrive at an informed conclusion.

Chapter Two examines the arguments for and against the merger and investigates how the AU addresses them in the enabling instruments. It engages with the reasons for and against the merger and cross-references it with the concerns raised by observers of African human rights. This analysis is undertaken to determine the

of another treaty is found in the example of the merger treaty that combined The Executive Bodies of the European Coal & Steel Community (ESCS), European Atomic Energy Community (Erratum) and the European Economic Community (EEC) into a single institution. The Treaty was adopted at Brussels, Belgium on 8 April 1965 entered into force 1 July 1967. The merged treaty established a single council and a single Commission of the European Communities. Treaty of the European Union (Maastricht Treaty) 1992 is another example of merged treaties.

europa.eu/legislation_summaries/institutional_affairs/treaties_ecsc_en.htm (accessed 15/05/2012).

⁷⁵ F Viljoen 'Advancing the rule and role of law in Africa- AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol' <http://www.africlaw.com> (accessed 08/06/2012).

extent to which it has influenced the AU in proposing the merger of the courts in its present format. The chapter also introduces the inclusion of the international crimes chamber to the present structure of the African Court of Justice and Human Rights Court. The purpose of this investigation is to determine the effect this inclusion would have on the Human Rights Section as proposed in the Draft Amending Merged Court Protocol and Statute. An analysis of the reasons for and against the merger will influence the outcome of this thesis in its determination of the preferred structure of the Human Rights Court to protect human rights.

Chapter Three discusses the structure of the Merged Court by analysing the source documents and mechanisms created to protect human and peoples' rights. The Draft Amending Merged Court Protocol and Statute will be analysed against the backdrop of the preceding protocols (African Human Rights Protocol and Merged Court Protocol) on the pertinent Sections that impinge on the structure of the Human Rights Section of the Merged Court. The micro- and macrostructure of the Merged Court will be discussed. The discussion will include the composition of the court; the qualifications, election and term of office of the judges; and the Sections and Chambers of the Court. The discussion will also focus on issues that have a bearing on the structure such as access to the court; the nature of judgments and implementation mechanisms; jurisdiction; and applicable law. Factors external to the Merged Court will be touched on that will indirectly filter upwards to impact on the structure of the Merged Court. In the final analysis of the structure, focus will primarily be directed to assisting in the determination of the structure that will be in the best interest for the protection of human and peoples' rights. The discussion will commence with the transitional provisions affecting the structure of the Merged Court as it sets the tone for the structure of the Court.

Chapter Four draws a conclusion from the facts of the investigation in the preceding chapters on the proposed Draft Amending Merged Court structure as the preferred court for the protection and promotion of Human Rights. Finally, it puts forward recommendations based on the outcome of the investigation.

Chapter Two

SINGULARITY OR DUALITY OF COURTS FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

2.1 Introduction

Chapter Two examines the arguments for and against the merger made by observers of the African Human Rights System. It investigates how the AU addresses them in the enabling instruments. This analysis is undertaken to determine the extent to which it has influenced the AU in proposing the merger of the courts in its present format. The chapter also introduces the inclusion of the international crimes chamber to the present structure of the African Court of Justice and the Human Rights Court. The purpose of this investigation is to determine the effect this inclusion would have on the Human Rights Section as proposed in the Draft Amending Merged Court Protocol and Statute. ‘The amendment on the merged protocol to include international crimes would severely infringe the composition and operation of the human rights Section of the ACJHPR’, argues Frans Viljoen.⁷⁶ Arguments such as this made by Viljoen make an analysis of the reasons for the merger necessary.

The study in this chapter will influence the outcome of this thesis in its determination of the preferred structure of the Human Rights Court. Commentators and observers of the African human rights hold mixed views on the proposal to have one judicial institution with jurisdiction over the African continent,⁷⁷ as discussed in the previous chapter. The idea of the merger of the African Human Rights Court with the Court of Justice was mooted by the AU. Some of the reasons for and against the decision to merge the two courts will be examined below.

2.2 Reasons for and against the merger of the two courts

2.2.1 *Arguments for singularity of courts*

Some observers of African human rights put forward reasons why they supported a merger of the two courts which included among others : the simplicity of a single court; a single court would avoid splitting human and financial resources while maintaining two courts; and the proliferation of human rights institutions would

⁷⁶ See note 75 above Viljoen.

⁷⁷ See note 50 above Kane & Motale at p.439; also see note 15 above Udombana at p.864; J D Boukongou ‘The appeal of the African system for protecting human rights’ (2006) 6(2) *African Human Rights Journal* p.268. Also see note 23 above Wachira at p.465.

likely have a negative effect on the effectiveness of the efforts to promote and protect human rights on the continent in that the courts with overlapping mandates could give rise to a risk of conflicting jurisprudence on human rights. Juma proffers additional reasons of note: that proliferation of courts could lead to ‘fragmentation of international law’, producing conflicting judgments and forum shopping. Furthermore, economic matters cannot be isolated from human rights, and therefore the Court of Justice and the African Human Rights Court will inevitably overlap in the future.⁷⁸

Observers of the African Human Rights system credit former President of Nigeria, Olusegun Obasanjo, with being instrumental with regard to the merger, after the African Human Rights Court had not received sufficient nominations for candidates to assume the office of judges.⁷⁹ Obasanjo cited similar concerns to those of other observers of African human rights in support of the merger. He stated that the lack of funds and the proliferation of organs of the African Union were the two foremost reasons.⁸⁰

The reasons that instigated the merger were heard and acted upon by the AU Assembly only after President Obasanjo’s utterances, despite the fact that similar reasons had been tabled by the Legal Council earlier and rejected.⁸¹

I shall now address the more important reasons that allegedly prompted the merger of the two courts.

2.2.2 Financial resources

One of the major factors driving the merger was the lack of financial resources as proffered by many African human rights observers.⁸² J Biegon agrees that finances were of concern to the extent that the African Commission for many years has been financially incapacitated. Despite the assistance of foreign funding, the African

⁷⁸ See note 1 above Viljoen & Baimu at p.252 & 257. Also see note 50 Kane & Motala at p.410. Also see note 3 above du Plessis & Stone at p.531.

⁷⁹ See note 50 above Kane & Motala at p.406 & 409.

⁸⁰ See note 50 above p.406. Also see note 17 above Sceats at p.5; and see note 72 above Juma at p.6–8.

⁸¹ See note 1 above Viljoen & Baimu at p.253.

⁸² See note 15 above Udombana at p.862. See also note 3 above du Plessis p.531; Yerima, TF ‘Comparative Evaluation of the Challenges of African Regional Human Rights Courts’ (2011) 4(2) *Journal of Politics and Law* p.125. See also note 16 above Peters at p.132; also see note 17 above Sceats at p.13. See note 72 above Juma at p.7; see also note 1 above Viljoen & Baimu at p.252.

Commission has remained cash strung.⁸³ Udombana argues that Africa's supranational institutions suffer from chronic financial incapacity, and questions the African Union's capability to provide the 'proposed two courts with resources'. He goes on to conclude that the establishment of two courts seems overly ambitious.⁸⁴ The AU to a large extent relies on the Member States' contributions to finance the operation of a number of institutions that fall within its purview, including those that were instituted under the mandate of the OAU.

There seems to be a lack of commitment on the part of Member States to comply with their obligations to the AU with regard to paying their contributions.⁸⁵ The AU recognised the seriousness of the lack of funds and saw fit to impose sanctions on any Member State that defaults in the payment of its contributions to the budget of the AU.⁸⁶ In May 2003, a Voluntary Contribution Fund for African Human Rights institutions was discussed and incorporated into a document known as the Kigali Declaration in order to encourage contributions from Member States. A budget of US\$ 2.25 million was proposed for the first operational year of the African Human Rights Court in 2007.⁸⁷ Despite the lack of funds in the AU, some African human rights observers did not consider this a valid reason for the merger of the courts.⁸⁸

2.2.3 Proliferation of courts with human rights jurisdiction

African States are parties to a plethora of human rights treaties at the international and regional levels.⁸⁹ This study, as stated above, is biased towards human rights and is not concerned with other disciplines of law. The purpose of analysing the proliferation of courts is to demonstrate the extent to which human rights jurisprudence could come into conflict if not managed efficiently.

Strictly speaking, there is no international Human Rights Court, and the closest mechanism to a court is the United Nations Human Rights Council, which is a quasi-

⁸³ Biegon J 'Human rights development in the African Union during 2009' *African Human Rights Law Journal* (2010) 10(1) at p.221. GTZ 'Strengthening Access to the African Court on Human and Peoples' Rights' <http://www.giz.de> (accessed 11/12/2011). See also note 82 above Yerima at p.125.

⁸⁴ See note 15 above Udombana at p.862–863.

⁸⁵ See note 1 above Viljoen & Baimu at p.253. In 2002 45 of the 54 Member States owed an amount of US\$ 54.53 to the OAU.

⁸⁶ See note 41 above Constitutive Act Art. 23.

⁸⁷ See note 50 above Kane & Motala at p.407.

⁸⁸ See note 23 above Boukongou at p.296.

⁸⁹ Gumede S 'The African Union and the responsibility to protect' at p.138 *African Human Rights Law Journal* (2010) 10(1).

judicial institution.⁹⁰The International Criminal Court(ICC) has jurisdiction over genocide, crimes against humanity and war crimes, and human rights fall outside its mandate.⁹¹ The Court is competent to judge crimes committed on the territory or by nationals of the State. There are 30 African States that have ratified the ICC Treaty, acquiring Membership status and accepting the competency of the Court to preside over international criminal matters.⁹²There will be an overlap of jurisdiction when the Draft Amending Merged Court Protocol and Statute comes into force, and this potential conflict need to be addressed by Member State and the AU.

The emerging economies in Africa have given rise to many regional and sub-regional mechanisms and institutions. Eight Regional Economic Communities (RECs)have been recognised by the AU following a decision taken by the AU's Assembly of Heads of States and Governments.⁹³ African States are often members of more than one REC and there exists the possibility of conflicting competencies. Three of these recognised sub-regional institutions have judicial arms that are empowered with concurrent human rights jurisdiction to that of the African Human Rights Court and the Human and Peoples' Rights Section of the proposed Tri-Sectional Court, to protect and promote human rights.⁹⁴The treaty establishing these institutions gives them a clear mandate to interpret the African Charter and other human rights instruments and, as argued by human rights observers, creates an opportunity for forum shopping.⁹⁵The three RECs include the East African Community (EAC),the Economic Community of West African States

⁹⁰OHCHR in the field: Africa OHCHR reports 2010. See also UN Human Rights Council: Membership by regional groups from 19 June 2006–18 June 2009. <http://www2.ohchr.org>[follow link to human rights bodies] (accessed 07/09/2011). Also see note 8 above United Nations.

⁹¹ Site of the international Criminal Court: www.icc-cpi.int (accessed 22/11/2012).

⁹² As at October 2009 the following African States were members of the ICC: Benin, Botswana, Burkina Faso, Chad, Central African Republic, Congo, Comoros, Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Uganda, United Republic of Tanzania and Zambia. www.claiminghumanrights.org (accessed 22/11/2012).

⁹³ These eight RECs have been established pursuant to the Treaty Relating to the Establishment of the African Economic Community of 1991. The following are included in the eight: Arab Maghreb Union (AMU), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority for Development (IGAD) and Southern African Development Community (SADC).

⁹⁴ See note8 above OHRCHR Human Rights Programme for Africa (2008–2009) <http://www.ohchr.org/en/>[follow link to countries – African Region page] (accessed 26/02/2012). Also see note15 above Udombana at 814–817; note 1 Viljoen&Baimu at p.242; note 82 Yerima at 124; see note 21 above Mubangizi at p.152–154.

⁹⁵ See note 82 above Yerima at p.124: also see note 15 above Udombana at p.813; see note 17 above Sceats at p.13.

(ECOWAS) and the Southern African Development Community (SADC). They are composed of sub-regional courts of justice to promote and protect human rights and are vested with jurisdiction to pronounce on human rights violations.

Members of the sub-regional institutions have acceded to the human rights incorporated and enshrined in these enabling instruments. The ECOWAS Treaty preamble enshrines the concept of promotion and protection of human rights as found in the African Charter. This is in terms of Article 4(g), which stipulates that human rights are a fundamental principle of the Treaty.⁹⁶ Article 22(1) of the same Treaty declares that ‘no dispute regarding interpretation or application of the provisions of the treaty may be referred to any other forum for settlement except that which is provided by the Treaty or this Protocol’. The EAC Treaty contains similar adherence to the fundamental human rights principles. More particularly, Article 6(2) of this Treaty relates to the obligations of the Member States to protect human rights in accordance with the African Charter. The Treaty empowers the EAC Court of Justice to interpret the provisions relating to human rights.⁹⁷ The SADC is empowered to establish a Tribunal of the Southern African Development Community with human rights jurisdiction. However, the 32nd SADC Summit of Heads of State and Governments confirmed the suspension of the SADC Tribunal.⁹⁸

Other sub-regional institutions are vested with express or implicit human rights jurisdiction. For example, included in the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance is paragraph 15, which refers to the protection and promotion of human rights. It further supports the African Charter, the African Commission and the African Human Rights Court. The African Peer Review Mechanism (APRM) established by this Treaty seeks to promote adherence to and fulfilment of the obligations of Member States in the Declaration.⁹⁹ The African Committee of Experts on the Rights and Welfare of the Child, established in July 2001, is empowered to receive State reports as well as communications from individuals, groups and recognised NGOs.¹⁰⁰ It is not clear to what extent these institutions will exercise their jurisdiction in making decisions on human rights violations and the relationship they will have with the proposed Tri-Sectional Court.

⁹⁶ See note 82 above Yerima at p.124.

⁹⁷ See note 93 above.

⁹⁸ *De Rebus*, Law Society of South Africa October 2012.

⁹⁹ See note 21 above Mubangizi at p.153.

¹⁰⁰ See note 21 above Mubangizi at p.158. Also see note 83 above Beigon at p.228–230.

The conclusion of observers of African human rights is that ‘the mandate to interpret the African Charter and other international human rights instruments is not the monopoly of the African Human Rights Court or the Merged Court’.¹⁰¹ Viljoen and Baimu argue that ‘[t]he proliferation of human rights institutions is likely to have a negative effect on the effectiveness of the efforts to promote and protect human rights on the continent’.¹⁰² They further warn that overlapping mandates could run the risk of conflicting jurisprudence. Udombana supports the call for a single court and argues that ‘Africa does not need two or more courts and ...the AU should settle for a single court to interpret all African legal instruments and adjudicate conflicts arising therefrom’.¹⁰³

There is a real concern that the various judicial institutions with similar jurisdiction may lead to forum shopping. While this may be so, it must be borne in mind that these judicial institutions will be operating at different levels. The sub-regional courts will have jurisdiction over those Member States within that region. The African continental human rights court has jurisdiction over all Member States irrespective of their affiliation to a sub-regional institution. This can be used to advantage rather than be considered an impediment, and can be developed in such a way that the African continental human rights court would have oversight on the sub-regional courts with regard to human rights issues. The AU must create a forum to engage with the sub-regional courts with regard to their human rights jurisdiction, given the fact that these institutions are here to stay. The negative perception of proliferation of judicial institutions and overlapping of human rights jurisdiction must be dispelled by adopting an inclusive strategy by the AU into the structure of the continental court.

The sub-regional courts are not specifically established to have human rights jurisdiction and therefore may not have judges with the necessary expertise to consider violations of human rights. It is therefore of vital importance that such decisions would be subject to scrutiny by a judicial authority that has expertise in human rights matters. In other words, these sub-regional courts could be courts of first instance for those choosing to approach these courts subject to the right of appeal to the African continental human rights court. The danger of conflicting

¹⁰¹ See note 82 above Yerima at p.124.

¹⁰² See note 1 above Viljoen&Baimu at p.252–253.

¹⁰³ See note 15 above Udombana at p.849.

judgments would also be addressed by subjecting the sub-regional jurisprudence to the scrutiny of the African continental human rights court. A system of hierarchy of courts would prevent forum shopping and would serve to lessen the workload of the African continental human rights court. However, this does not prevent victims from approaching the African Commission, which in turn, based on their merit, could refer human rights issues to the African continental human rights court the African Human Rights Court, or the Merged Court of the Tri-Sectional Court.

The sub-regional institutions were primarily established to develop political and economic co-operation between Member States. The AU should foster cohesion among Member States with regard to economic and political development. This has the potential to impact positively on human rights protection in that violations would result in sanctions of a political and economic nature should the Member States fail to comply with the court's decisions.¹⁰⁴ Therefore, the merger of the African Human Rights Court with the Court of Justice, which has economic and political jurisdiction, would be expedient for the protection and promotion of human rights. To this end, the sub-regional institutions should be effectively used to promote and protect human rights in collaboration with the AU.

However, proliferation within the AU poses a problem with the creation of various organs under its jurisdiction. This is so even when the organs are duplicated with overlapping mandates such as those which currently exist between the African Human Rights Court and the Court of Justice and which are empowered to determine human rights issues. This problem will resolve itself when the merger of these two courts comes into force. Technically, the African Human Rights Court is not an organ of the AU; nevertheless, it falls within its ambit of jurisdiction as a continental judicial mechanism. Secondly, as a result of the scarcity of financial resources, the existence of two judicial institutions with concurrent human rights jurisdictions will compete for such funds. This could be detrimental to the efficient operation of both mechanisms. In the circumstances, the proposal of a merger is very attractive, with the proviso that it is able to protect and promote human rights to its fullest extent.

¹⁰⁴ See note 41 above Constitutive Act Art. 23(2). Also see note 49 above Merged Court Protocol Art. 46(5). The Assembly may impose sanctions by virtue of paragraph 2 of Article 23 of the Constitutive Act.

2.3 Arguments against the merger of the court

Not all African human rights observers considered finance and proliferation as valid reasons for a merger of the two courts. The experts at the Grand Bay meeting of June 2003 also raised this concern.¹⁰⁵ They commented that a merger would relegate human rights to other issues on the African continent.

Boukougou argues that the observers of African human rights who subscribe to ‘the doctrine of the merger’ do not explain the validity of such an operation. Their ‘justification as to the lack of means or the institutional congestion of the AU seems to be a pretext for those who fear having to be forced to ratify the Protocol’ of the African Human Rights Court.¹⁰⁶ Boukougou argues further that the rationalisation of means and optimisation of costs masks a desire to bury the African Human Rights Court. He further argues that the consequence of the merger would result in a regression of the jurisprudence courageously developed by the African Commission. Wachira, another of the African human rights observers, has a similar view, and is of the opinion that the African Commission is ‘a body whose continued existence cannot be compromised except if the AU had a better alternative in mind to safeguard the rights of the African people on a continent rife with human rights violations’.¹⁰⁷

AU Member States addressed the issue of funding at length at the Grand Bay meeting of experts in June 2003, and voted against the merger. They argued that the insufficiency of adequate financial resources affected all African Union institutions and therefore should not be used as the rationale for merging the two courts.¹⁰⁸ In this regard, Du Plessis observes that the excuse of insufficient funds to argue the cause of a single court is not convincing as the very organisation, the AU, is solely responsible for providing the funds and ‘should be compelled to ensure that adequate resources are provided to render the African regional human rights system a meaningful and effective component of the overall regional framework’.¹⁰⁹ Other observers such as Boukougou argue that the AU has created other organs that also require funds, such as the tedious Pan-African meetings, and question whether Pan-

¹⁰⁵ See note 50 above Kane & Motala at p.412.

¹⁰⁶ See note 50 above Kane & Motala at p.294.

¹⁰⁷ See note 23 above Wachira at p.479.

¹⁰⁸ See note 50 above Kane & Motala at 412 for a detailed account of the Grand Bay Meeting. See also note 23 above Boukougou at p.294.

¹⁰⁹ See note 3 above Du Plessis & Stone at p.530.

African bureaucracy ‘deserves more attention than an African Court on Human Rights’.¹¹⁰

Observers of African human rights have expressed a fear that the merger of the courts will detract from the all-important emphasis of promoting and protecting human rights. An independent human rights judicial institution based on the existing international models in Europe and America is perceived to be the norm. Africa does not have the resources or the political commitment to maintain a separate Human Rights Court, given that Africa’s judicial need extends beyond the realm of human rights, which does not include peace, security and the rule of law. Another concern on the merger of the courts is that the enabling instruments do not cater for the termination of these mechanisms by the exclusion of relevant clauses that would facilitate the process.

2.3.1 *Legal requirements enabling the merger*

Neither the African Human Rights Court Statute nor the Protocol to the Court of Justice contains a termination clause. Although negligence or oversight cannot be ruled out, this omission could be the result of using as a model, clauses from prior instruments.¹¹¹ It has been argued that the drafters of these instruments or the Member States did not foresee that these treaties would in the future be terminated. The Vienna Convention is clear on the issue of termination and the fact that parties are bound by the treaties once they are entered into force by the *pacta sunt servanda* rule.¹¹² In the absence of a termination clause in the treaties, the relief sought would have to be found in international treaty law, which is grounded in the Vienna Convention.¹¹³ The termination of a treaty may take place as a result of the application of the provisions of the treaty of the present Convention.¹¹⁴ Where a treaty contains no provision regarding its termination and does not provide for denunciation, unless it is established that the parties intended to admit the possibility of denunciation, or a right of denunciation may be implied by the nature of the treaty, such treaty cannot be terminated.¹¹⁵ From the text, or the interpretation of it in

¹¹⁰ See note 23 above Boukongou at p.295. See also note 74 Vienna Convention art 26.

¹¹¹ Christtakis T ‘Article 56 Convention of 1969’ 1253 note 74 above.

¹¹² Art. 26 above. See also note 25 Vienna Convention on the Law of Treaties 1969 done at Vienna on 23 May 1969, entered into force on 27 January 1980.

¹¹³ Chapaux V ‘Article 54 Convention of 1969’ 1237. See also note 74 above Vienna Convention.

¹¹⁴ Art. 42 Vienna Convention of 1969.

¹¹⁵ Art. 56 Vienna Convention; Art. 78 of the American Convention of Human Rights; Art. 65 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

the context of the two protocols, the above requirements cannot be gleaned even under a generous interpretation.

The Vienna Convention provides for two ways by which treaties can be terminated; one in terms of the provisions in the treaty in confirmation of the *pacta sunt servanda* rule, and the other at any time by consent of all parties after consultation with the other contracting States. Termination of treaties in the second instance will take effect only after these two conditions have been met. The consequence of termination of a treaty frees all parties from the obligation to continue with its execution. The OAU Charter and the Constitutive Act contain similar amendment and revision clauses, which are premised on the Vienna Convention.¹¹⁶ This is a clear indication that the drafters acknowledged the difference between the two procedures for the adoption of a review or amendment.

It is argued that in terms of the Vienna Convention, the amendment clauses in the two protocols which are the subject of the merger cannot be invoked to terminate them; nor can they be used to merge the two. In situations where the treaty itself does not provide for its termination, then the provisions of the Vienna Convention are invoked, provided that valid circumstances for the termination exist. The question posed by commentators such as Kithure Kindiki as to whether a treaty can be used to abrogate another treaty is answered in the affirmative, in terms of the Vienna Convention.¹¹⁷

From the above it is submitted that Member States Parties to both the African Human Rights Court and the Court of Justice can enter into a treaty to terminate each of the treaties individually, and thereafter enter into another treaty to merge the two courts into a single court. However, the decision to merge has to come from the State Parties and not from the AU Assembly, as is the case with regard to the present Protocol and Statute to the ACJHR. This is contrary to the provisions of the two protocols which are the subject of the merger and the provisions of the Vienna

¹¹⁶Note 74 above. See note 25.

¹¹⁷Kindiki 143 note 16 above. See also Sands note 74 above p.969. The merger of treaties by means of another treaty is found in the example of the merger treaty that combined The Executive Bodies of the European Coal & Steel Community (ECSC), European Atomic Energy Community (Euratom) and the European Economic Community (EEC) into a single institution. The Treaty was adopted at Brussels, Belgium on 8 April 1965 entered into force 1 July 1967. The merged treaty established a single council and a single Commission of the European Communities. Treaty of the European Union (Maastricht Treaty) 1992 is another example of merged treaties. europa.eu/legislation_summaries/institutional_affairs/treaties_ecsc_en.htm (accessed 15/05/2012).

Convention. The defect is addressed to some degree by the proposal to amend the Protocol to the Court of Justice to establish the ACJHR as the primary judicial institution of the AU.¹¹⁸ However, this is not sufficient to remedy the defect, given the fact that the African Human Rights Court is a treaty-based mechanism and is not a creature of the AU. To compound the problem further, the Court of Justice as envisaged originally by the AU is entered into force.¹¹⁹

The enabling instrument of the ACJHR in its present form is not legal in terms of the law of treaties. The absence of termination clauses in both the protocols that is the subject of the merger could invoke the provisions of the Vienna Convention as mentioned above, and thereafter a new treaty could be entered into to establish the Merged Court. The Member States to the African Human Rights Court are not the same as the Member States to the Court of Justice, and vice versa. In the premises, the termination process must be conducted separately and independently to comply with the rule of law. Alternatively, the Protocol and Statutes to the ACJHR in its present form have to be abrogated by the AU and proposed by a State Party, and this must be consented to by all parties who are parties to the two protocols in order to give effect to the merger. This may prolong the operation of the ACJHR as envisaged by the AU, but it will conform to the rule of law. This will be in compliance with the Vienna Convention, and the AU's credibility will remain intact.

2.4 Conclusion

It is evident that observers hold conflicting views on the ability of the AU to provide financial support for the African Human Rights Court. The African Human Rights Court is estimated to have expended more than US\$12.5 million since its inception, and its annual budget is estimated at US\$7 million.¹²⁰ The AU, through the establishment of the ACJHR, has assumed the responsibility of ensuring that adequate resources are provided for the advancement of human rights protection.¹²¹ The fact that the AU has drafted a budget for the Merged Court is evidence that the AU is well aware of the funding requirements it has to meet. The

¹¹⁸ 2003 Amendment to the ACJHR Protocol. The amendment requires a 2/3 majority to be adopted and only 28 State Parties have signed and 3 deposits of ratification received to date. www.african-court.org/en/ (accessed 27/02/2013).

¹¹⁹ Note 4 above. To date 43 of the 53 Member States are signatories to the Protocol. 16 deposits of the instrument of ratification have been made resulting in the Protocol being entered into force on 11 February 2009.

¹²⁰ See note 82 above Yerima at 125.

¹²¹ See note 49 Protocol on the Statue of the African Court of Justice and Human Rights Art. 26(2) 'The budget of the court shall be borne by the African Union.'

arguments put forward by some observers of African human rights that funding should not be used as a reason for the merger may have some merit, but no convincing reasons have been put forward to back up these arguments. It is true that the Human Rights Court is up and running despite the cries that it is inadequately funded, understaffed and has an adopted seat in Tanzania.¹²² The Court of Justice is a step away from becoming fully functional, although as stated above, the election of judges to this court has been suspended.¹²³ However, having to finance two separate institutions will no doubt increase the need for additional resources. Therefore, it would make economic sense to rationalise the number of institutions that fall within the ambit of the AU and thereby avoid duplication of costs.

The AU Commission was entrusted in 2007 with the task of giving effect to the Kigali Declaration of 2003 by setting up the Voluntary Contribution Fund for African human rights institutions.¹²⁴ At the eighteenth Ordinary Session of the AU Assembly of Head of States, a resolution was passed to urge Member States to pay up their contributions timeously and clear all arrears.¹²⁵ This was a follow-up from the previous Session of the Assembly held in July 2011, when it had been tabled that the dire financial situation of the AU had been caused by delays in Member States' honouring of their assessed contributions. The Assembly had further expressed deep concern over growing reliance on partner funds to finance the continent's integration and development agenda.¹²⁶ It would be left to the AU to fund the Tri-Sectional Court in the event that it became operational.

The proposed inclusion of the international criminal law Section in the Merged Court has drawn criticisms from some observers of African human rights. Frans Viljoen makes a strong argument against the inclusion of this Section into the Merged Court. He argues for the separation of the international criminal court and the Merged Court. This is premised on the following reasons: the incompatibility of mandates between the general Section and human rights on the one hand, and the international

¹²² See note 22 above. The Human Rights Court to date has 49 signatures and 26 Member States of a possible 53 have deposited their instruments of ratification.

¹²³ Note 44 above. The Court of Justice to date has 43 signatures and 16 Member States have deposited their instruments of ratification. This constitutes less than 33% of the AU members but sufficient to be entered into force, as the Protocol provides for 15 instruments of ratifications to be deposited for enforcement.

¹²⁴ See note 50 above Kane & Motala at p.407.

¹²⁵ See note 50 above Kane & Motala 'Decision on the Contribution of Member States to the Budget of the African Union' Doc.EX.CL/687 (XX) iv.

¹²⁶ 17th Ordinary Session of the Assembly 30 July 2011 held at Matabo, Equatorial Guinea. 'Decision on Alternative Source of Financing the AU.' Doc. EX.CL/656(XIX).

criminal law Section that the amendment seeks to add to the Merged Court on the other; the reluctance of States to ratify the Draft Amending Merged Court Protocol and Statute, in particular States that favour the ICC and the African Human Rights Court; States that have had a negative experience with the African Human Rights Court and which will not ratify the Draft Amending Merged Court Protocol and Statute; the shift of focus from human rights to international criminal issues and the systematic eroding of the prominence of human rights; and the added cost burden as a result of the inclusion of the international criminal law Section, which goes against funding reasons used to merge the courts.¹²⁷

It stands to reason that the budget of the Merged Court will more than double with the inclusion of the international criminal law Section, when compared to the budget of the African Human Rights Court.¹²⁸ It must be remembered when one institution expands to incorporate additional Sections, there will also be cost implications which may of necessity, or may not be, more than the cost of upkeep for two separate institutions. If merging the two courts without compromising human rights protection and promotion would help to lighten the financial burden, then merger is the route to pursue. However, the structure of the merger will determine if this will be the appropriate forum for the protection and promotion of human rights within the AU. Viljoen is not against the Merged Court being structured to include a general and human rights Section. What he is opposed to is the inclusion of the international criminal law Section in the Merged Court. He argues that such inclusion would be detrimental to the protection of human rights, as more emphasis will be placed on international criminal law at the expense of human rights. This study supports the argument as expounded by Viljoen and agrees that the general Section and human rights can coexist without one Section usurping the other. There is no reason to believe that the same cannot be said of the International Criminal Law Section being included into the structure of the Merged Court, save for the fact that in the international forum, this proposed Tri-Sectional structure is unprecedented.

In support of this argument, one can examine the Constitutive Act and the Court of Justice Protocol to glean the intention of the AU regarding the inclusion of international criminal law in the court as a Section firstly of the Court of Justice and secondly of the Merged Court. As an example, one of the principles enshrined in the

¹²⁷ See note 75 above Viljoen at p.6.

¹²⁸ See note 82 Yerima at 125.

Constitutive Act of the AU is ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’, African Union Members have entered into a Treaty of non-aggression and undertake to arrest and prosecute any irregular armed group(s), mercenaries or terrorist(s) who pose a threat to any Member State.¹²⁹

The AU deliberately provided for another court in the form of the Court of Justice by declaring it an organ of the AU to the exclusion of the African Human Rights Court. As discussed in Chapter One, the African Human Rights Court was adopted in 1998 before the establishment of the AU in 2001. It cannot be said that the AU was unaware of the African Human Rights Court’s existence when the drafters saw fit to exclude it from the embrace of the AU and provide for another court. This demonstrates a clear intention on the part of the AU to leave the African Human Rights Court to operate independently of the Court of Justice. This can be further gleaned from the provisions of the Constitutive Act for the Court of Justice to have jurisdiction over general and international criminal law issues to the exclusion of human rights matters. Article 4(h) of the Constitutive Act confers a ‘right’ on the AU to intervene in a Member State in respect of grave circumstances. The same right is not conferred in respect of human rights save to ‘respect’ democratic principles, human rights, the rule of law and good governance in terms of Article 4(m). One of the objectives of the AU is clearly to promote and protect human rights in terms of Article 3(h). However, this is not reflected in the Court of Justice Protocol as entrusted by Article 18(2) of the Constitutive Act. The qualification of judges, eligibility to submit cases, jurisdiction and sources of law do not reflect any direct link to the protection of human rights. This can be drawn only from inference from the objective and principles in the Constitutive Act as referred to above, and the broad terms in which some Articles are couched in the Court of Justice Protocol, such as Article 19(2), which confers power on the Court to assume jurisdiction over any dispute other than that referred to in the Article, which is devoid of any reference to human rights. Unlike the Court of Justice Protocol, the African Human Rights Protocol clearly and unambiguously is engineered solely for the promotion and protection of human rights.

¹²⁹ See note 41 above Constitutive Act Art. 4(h). Also see note 23 above Boukongou at p.297.

The AU saw fit to rectify this omission on its part, by accepting the proposal to merge the Court of Justice with the African Human Rights Court. This is proof enough that there was a lack of intention by the AU to include human rights in its court and for the African Human Rights Court to remain independent. However, this does not show that the proposed structure of the Tri-Sectional Court will be detrimental to the protection of human rights.

The Merged Court Protocol and Statute is presently under consideration to be amended to change the court to the African Court of Justice and Human and Peoples' Rights.¹³⁰ The Draft Amending Merged Court Protocol and Statute empowers the African Court of Justice and Human and Peoples' Rights to have jurisdiction over international crimes.¹³¹ The structure of the Merged Court consists of two Sections, a General Affairs and a Human Rights Section.¹³² The Amending Draft Merged Court Protocol and Statute proposes three Sections: General Affairs, Human and Peoples' Rights and International Criminal Law.¹³³ This supports the arguments of this study that the AU envisaged a court with general and international criminal jurisdiction to the exclusion of human rights.

The AU was not to be the authoritative body with oversight of the Human Rights Court. It concentrated on the establishment of a general affairs and international criminal law judicial institution in the guise of the Court of Justice.¹³⁴ The proposed merger of the African Court on Human Rights and the AU's Court of Justice in the style of the African Court of Justice and Human Rights remedied the error and omission on the part of the AU. Observers of African human rights believe that the proposed draft would jeopardise the existence of the human rights Section, embodied within the new proposed amendment, to incorporate an international criminal law Section, as mentioned earlier in this thesis. The fact that the AU has suspended the

¹³⁰ See note 51 above Draft Amending Merged Court Protocol Art. 8 In the Protocol and the Statute wherever it occurs 'African Court of Justice and Human Rights' is deleted and replaced with 'African Court of Justice and Human and Peoples' Rights'.

¹³¹ See note 51 above Merged Court Protocol Art. 3(1): 'The Court is vested with an original and appellate Jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the Statute annexed hereto.'

¹³² See note 49 above Merged Court Statute Art. 16 The Court shall have two(2) Sections, a General Affairs Section composed of eight (8) judges and a Human Rights Section composed of eight (8) judges.

¹³³ See note 51 above Draft Amending Merged Court Statute Art. 16: 'The Court shall have three (3) Sections: a General Affairs Section, a Human and Peoples' Rights Section, and an International Criminal Law Section.'

¹³⁴ See note 41 above Constitutive Act Art. 5(d).

further process of the Court of Justice and has proposed the Merged Court is evidence that they have taken heed of the arguments of African human rights observers, and to a large degree, the comments of former President Olusegun Obasanjo, as mentioned above.

The stance of this thesis is that it is not adverse to a merger to rationalise costs and to avoid proliferation and conflicting jurisprudence on human rights issues. What the study explores is the proposed structure of the merger, which it argues may be structured without prejudicing its mandate for protecting and promoting human rights. Furthermore, the study reveals that the African Human Rights Court, if left in its present form, will stand outside the protection of the AU. It would be expedient for this court to be embraced by the AU to ensure the protection of the political clout that the AU affords. Furthermore, the status of the African Human Rights Court will be elevated from being out in the cold to ascending to the upper rungs within the structure of the AU. The Merged Court would bring with it the political clout of the AU to ensure compliance with the court's decisions.

The next chapter discusses the Merged Court Protocol and Statute so as to determine how the AU envisages the structural relationship in the merger between the African Human Rights Court and Court of Justice. This discussion will be linked with an examination of the Draft Amending Merged Court Protocol and Statute in order to determine if some of the lacunae identified in the Merged Court Protocol and Statute have been addressed, and the effect the inclusion of the international criminal law Section will have on the human rights Section. A further assessment will be undertaken of the Merged Court Protocol and Statute, against the backdrop of the African Human Rights Protocol, to determine if the same protection of human rights afforded by the later Protocol is embodied in the Merged Court Protocol and Statute.

More importantly, some of the provisions in the transition process affecting the structure of the Merged Court will come under scrutiny to make a determination on the perpetuation of the protection of human rights. Chapter Three will further discuss the pertinent Sections such as the composition of the court, qualification of the judges, access to the court, the nature of judgments and implementation mechanisms, jurisdiction and applicable law. This analysis will assist in the determination the providing an insight into how the AU through the enabling instrument of the Merged

Court addresses the concerns of the observers of African rights in order to protect human rights.

Chapter Three

AN ANALYSIS OF THE POTENTIAL AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS

3.1 Introduction

The African Human Rights Court, as stated above, is the only continental court in African and the first ever human rights court with the power to pronounce binding decisions on Member States that violate human rights on the African continent. This Court was primarily established to complement the African Commission in attaining the objectives of the African Charter,¹³⁵ and as such is an integral part of the African human rights protection mechanism. The Court is empowered with contentious and advisory jurisdiction in the interpretation and application of the African Charter, African Human Rights Protocol, and other Human Rights instruments ratified by Member States.¹³⁶ In order that this mandate may be fulfilled, eleven jurists with high moral character, of recognised practical judicial or academic competence, and experienced in the field of human and peoples' rights are elected to this African Human Rights Court.¹³⁷ The judges are elected on a part-time basis for a period of six years, save for the Judge President, who is elected on a permanent two-year term with the option of being re-elected.¹³⁸ The administration duties of the Registry of the court are entrusted to a Registrar and other staff appointed in terms of the Rules of Procedure.¹³⁹

There is no uncertainty as to the applicable law in this court. All ambiguity is removed by the court being directed to apply the provisions of the African Charter and any other relevant human rights law ratified by the Member States.¹⁴⁰ By implication, this will include the Universal Declaration on Human Rights, the African Charter on the Rights and Welfare of the Child, and the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Direct accessibility to this Court is open to the African Commission, State Parties, African Intergovernmental Organisations (AIOs), and NGOs with observer status before the

¹³⁵ See note 22 above African Human Rights Court Protocol Art. 2.

¹³⁶ See above Art. 3 and 4.

¹³⁷ See above Art. 11 and 14.

¹³⁸ See above Art. 15 and 21.

¹³⁹ See above Art. 24.

¹⁴⁰ See above Art. 7.

African Commission.¹⁴¹ Individuals are restricted from directly approaching this court without the intervention of the State concerned.¹⁴² In this regard, the African Commission plays a pivotal role by providing a gateway for individuals to gain access to the African Human Rights Court.

The structure of the African Human Rights Court as discussed above leaves no doubt that the court is crafted to provide maximum protection for human rights. However, this would be of no avail without the power of the court to make decisive and binding judgments in time of extreme gravity and urgency in order to prevent human rights violations, which the African Human Rights Court is empowered to do.¹⁴³ The court's decisions are final and not subject to appeal.¹⁴⁴ The Council of Ministers and the Assembly of the AU have assumed the responsibility, in the place of the defunct OAU, of overseeing the implementation of the judgments and compliance with the orders to remedy the violation, including payment of compensation and reparation.¹⁴⁵

The African Human Rights Court is structured to provide maximum protection against human rights violations. Since becoming operational in 2006, the African Human Rights Court has received 21 applications, as at the end of 2012.¹⁴⁶ The under-utilisation of the court can be attributed to the fact that it is reliant upon the African Commission to refer applications to it. Other reasons, such as the lack of promotion of and exposure to the African Human Rights Court to all its peoples on the continent has also contributed to the low number of applications received by the court. This could warrant the merger of courts, but if not done properly, such merger may pose a threat to the protection of human rights.

This chapter will discuss the microstructure of the Tri-Sectional Court which includes the infrastructure, the core structure and the intellectual structure. The macro-structure will focus on the mechanisms outside the jurisdiction of the AU, but which have an impact on the Human and Peoples' Rights Section of the Tri-Sectional Court for the protection of human and peoples' rights. The source of the

¹⁴¹ See note 22 above African Human Rights Court Protocol Art. 5. AIOs are not defined. NGOs are required to meet the test of being relevant and with observer status before the African Commission. There is no standard set as to what is considered to be relevant and as such poses a problem as to the determination of the relevance that NGOs have to meet.

¹⁴² See above Art. 5(3) read with Art. 34(6).

¹⁴³ See above Art. 27(2).

¹⁴⁴ See above Art. 28(2).

¹⁴⁵ See above Art. 27(1).

¹⁴⁶ AfCHPR – Judgment and orders <http://www.african-court.org/en/> (accessed 27/02/2013).

analysis is the enabling instruments of the African Human Rights Court Protocol, the Merged Court Protocol and Statutes and the Draft Amending Merged Court Protocol and Statute, including other relevant human rights instruments, whether they are universal, international or regional.

3.2 The microstructure of the Merged Court

3.2.1 *Protocol and Statute of the Merged Court and Draft Amending Merged Court*

The first part of the enabling instrument of the Merged Court is the Protocol (Merged Court Protocol) which deals with the legal issues of the proposed merger including the transition process; while the second part, the Statute (Merged Court Statute) sets out the organisational requirements, jurisdictional competency, and procedural aspects, including Advisory Opinions of the ACJHR. Each part will be discussed separately and the lacunae identified will be checked against the Draft Amending Merged Court Protocol and Statute to verify if they have been addressed.

3.2.2 *Transition process*

The transition process sets the tone for the structure of the Merged Court. It determines the fate of the judges serving in the African Human Rights Court and the pending cases. It clarifies the position with regard to the existence of the Registry and continued employment of the staff presently with the African Human Rights Court. At the adoption of the Merged Court Protocol and Statute, the draftsman did not envisage that the AU's judicial institution in the form of the Court of Justice would be entered into force. This has resulted in a situation where provision has been made for the transition of only the African Human Rights Court and not the Court of Justice.¹⁴⁷ Member States have seen fit to go ahead with the ratification of the Court of Justice in the full knowledge that there is a positive intention on the part of the AU to establish the Merged Court.¹⁴⁸ As referred to above, this action demonstrates clearly that State Parties are in no great hurry to ratify the Merged Court into force.¹⁴⁹ The exclusion of the Court of Justice from the transition process shows that the AU overestimated the desire of State Parties and Member States to the Merged Court Protocol to see the Merged Court come into force. This could also be

¹⁴⁷ See note 49 above Merged Court Protocol Chapter 2.

¹⁴⁸ See note 44 above Court of Justice Protocol.

¹⁴⁹ See note 49 above.

attributed to the AU's perceived intention to submerge the African Human Rights Court into the structure of the judicial organ it had created. This does not bode well for human rights protection, as it presents a serious structural defect in the Merged Court. The mere change of name from the African Court of Justice and Human Rights to ACJHPR, as proposed by the Draft Amending Merged Court Protocol and Statute, will not cure this defect.¹⁵⁰

A further indication of the African Human Rights Court being subsumed by the Merged Court is the approach adopted by the termination of the services of judges presently serving the court. Despite Article 4 being couched differently in the Draft Amending Merged Court Protocol and Statute, it does not address the position of judges who may be presiding over matters at the time when a new set of judges is sworn in to the ACJHPR. The Draft Amending Merged Court Protocol and Statute makes provision for terminating the services of appointed judges to the African Human Rights Court at the point when judges are sworn in to the Tri-Sectional Court.¹⁵¹ The terms of the African Human Rights Court judges must be extended to a date when matters over which they are presiding have been completed. This would avoid unnecessary time wastage and prejudice to the victims of violations. This is further compounded by the determination of how to dispose of pending cases. Article 6 of the Draft Amending Merged Court Protocol and Statute provides for pending cases before the African Human Rights Court and the Merged Court to be concluded pursuant to the Rules of the ACJHPR. However, the Merged Court Protocol specifically provides for human rights cases to be concluded in terms of the African Human Rights Court Protocol.¹⁵² This avoids any confusion or uncertainty that the Draft Amending Merged Court Protocol and Statute provision creates with regard to pending cases on human rights violations. The Draft Amending Merged Court Protocol and Statute creates an impression that it intends to discard any trace of the African Human Rights Court within the structure of the Tri-Sectional Court. This perception will impact adversely on the Merged Court's ability to protect human rights. The only way to make sense of this provision on pending cases, Du Plessis and Stone argue, is 'to read this provision into an acknowledgement or worse,

¹⁵⁰ See note 51 above Art. 8 of the Protocol.

¹⁵¹ See note 51 above Art. 5 of the Protocol.

¹⁵² See note 49 above Art. 5 of the Protocol.

a prediction, on the part of the drafters, that the Merged Court is unlikely to become a legal reality for some time'.¹⁵³

A positive inclusion in the Draft Amending Merged Court Protocol and Statute is security of tenure for the staff of the Registry of the African Human Rights Court. However, it neglects the staff of the Merged Court after acknowledging the possibility that this court may become operational before the ACJHPR is entered into force, unless it sees the Merged Court and the ACJHPR as being one and the same court, and there being no need to make such provision. If this were true, the question arises as to why provision should be made for pending cases from the Merged Court to be continued before the relevant Section of the ACJHPR.

The transition process sends a clear signal that it intends to phase out the core structure upon which the African Human Rights Court is founded including the judges, Registrar and staff. The Draft Amending Merged Court Protocol and Statute further seeks to dismiss the African Human Rights Court Protocol by directing that pending cases transferred from the African Human Rights Court be determined in terms of the Merged Court Rules, rather than the African Human Rights Court Protocol.

3.2.3 *The core structure of the Merged Court*

The Merged Court Protocol and Statute provides for sixteen judges of high moral character and in possession of qualifications required in their respective countries for appointment to the highest judicial offices.¹⁵⁴ The Merged Court may recommend a review of the number of judges through the AU Assembly if required.¹⁵⁵ The Merged Court is divided into two Sections, a General Section, composed of eight judges, competent and experienced in international law; and a Human Rights Section, composed of eight judges with competence and experience in human rights law.¹⁵⁶ Judges are elected to serve on a part-time basis for a period of six years, except for the President and Vice President, who serve full-time for a three-year term.¹⁵⁷ Each Section may constitute one or several chambers, while a joint sitting from both

¹⁵³ See note 3 above du Plessis & Stone at p.543.

¹⁵⁴ See note 49 above Arts. 3 and 4 of the Statute.

¹⁵⁵ See note 49 above Art. 3(1) The Court shall consist of sixteen (16) Judges who are nationals of Member State parties. Upon recommendation of the Court, the Assembly may review the number of judges.

¹⁵⁶ See note 49 above Arts. 4 and 16 of the Statute.

¹⁵⁷ See note 49 above Arts. 8 and 22 of the Statute.

Sections with a quorum of nine Judges constitutes a Full Court.¹⁵⁸ The Merged Court Protocol and Statute provides for a single Registrar with joint staff members and is silent on the term of employment. This structure will not diminish the importance and /or weaken the Human Rights Section as presently offered by the African Human Rights Court. Although there are some lacunae that need to be addressed, the protection of human rights will be secured by the continued implementation in the two Sectional Merged Courts. However, the Draft Amending Merged Court Protocol and Statute does address some of the lacunae and, at first glance, appears not to strengthen or maintain the status quo of either the African Human Rights Court or the Merged Court. The Draft Amending Merged Court Protocol and Statute by the nature of its structure seeks to redistribute the resources of the present Merged Court. It favours and includes additional personnel to the international criminal law Section. This creates a bias towards this Section of the Court.

The Draft Amending Merged Court Protocol and Statute provides for the Court to be divided into three Sections: General Affairs, Human and Peoples' Rights, and International Criminal Law.¹⁵⁹ The International Criminal Law Section is further divided into three chambers: a Pre-trial Chamber, a Trial Chamber, and an Appellate Chamber. Observers of the African human rights system argue that the Tri-Sectional ACJHPR will be an added financial burden to the AU and furthermore, that more emphasis will be given to international criminal law than to human rights.¹⁶⁰ It is likely that the structural change to the Merged Court by the inclusion of international criminal jurisdiction¹⁶¹ will create a superstructure requiring more human and financial resources. The International Criminal Law Section proposes the appointment of a Prosecutor to serve for a seven-year term and two assistant Prosecutors, who will each serve a four-year renewable term.

The core structure of the Human Rights Section is also under threat, as the sixteen judges will be divided among the three Sections disproportionately. The General and Human Rights Sections will both have five judges as opposed to eight in terms of the Merged Court Protocol, and six judges will constitute the International Criminal Law

¹⁵⁸ See note 49 above Art. 19 and 21 of the Statute.

¹⁵⁹ See note 51 above Art. 6(1) of the Statute reads: The Court shall have three (3) Sections: a General Affairs Section, a Human and People Rights Section and an International Criminal Law Section.

¹⁶⁰ See note 75 above Viljoen at p.5.

¹⁶¹ See note 51 above Art. 3(1) of the Protocol reads: The Court is vested with an original and appellate jurisdiction, International criminal jurisdiction, which shall exercise in accordance with the provisions of the Statute annexed hereto.

Section. The allocation of judges to the Human Rights Section has been drastically diminished from eleven to five judges in the proposed Draft Amending Merged Court Human Rights Section. However, this may not have an adverse effect on the Human Rights Section in the future; as stated above, the number of judges may be increased upon recommendation of the Court. In addition, the Draft Amending Merged Court Protocol and Statute recommends that allocation of judges to the respective Sections and Chambers shall be determined by the Court in its Rules. This suggests that the Human Rights Section, should the need arise, on the recommendation of the Court may request the services of more judges.

The Draft Amending Merged Court Protocol and Statute has to a certain extent addressed the lacunae that positively affect the core structure of the Merged Court. There is a proposal for the term of judges to increase from six to nine years with the provision of being appointed on a permanent basis.¹⁶² This provision is similar to that of the European Court of Human Rights (ECHR), where judges are appointed on a permanent basis for a term of nine years and can be re-elected. However, there is a difference, in that all 47 States are represented in the ECHR judiciary.¹⁶³ The Draft instrument further ensures that judges are appointed with due regard to gender equality.¹⁶⁴ The Draft Amending Merged Court Protocol and Statute is empowered to constitute an Appellate Chamber to hear Human Rights appeals, which are not provided for in the present Merged Court Statute, or the African Human Rights Protocol.¹⁶⁵ The Human and Peoples' Rights Section is competent to hear all cases relating to human and people's rights.¹⁶⁶ The decision of this Section is subject to revision only on grounds of 'new fact', which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision.¹⁶⁷ The Draft

¹⁶² See note 51 above. Art. 5 of the Statute reads: 5(1) The Judges shall be elected for a single, non-renewable term of (9) years; 5(5) The Assembly shall, on the recommendation of the Court, decide the time when all Judges of the Court shall perform their function on a full time basis.

¹⁶³ European Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe on 4 November 1950, Rome. Entered into force: 3 September 1953. Art. 38. Registry of the European Court of Human Rights. <http://www.echr.coe.int> (accessed 27/10/2011); The European Human Rights System. http://www.hrea.org/index.php?doc_id=365 (accessed 27/10/2011).

¹⁶⁴ See note 51 above. Art. 2 of the Statute reads: 'The Assembly shall ensure that there is equitable gender representation in the Court.'

¹⁶⁵ See note 51 above. Art. 8(3) of the Statute reads: 'An appeal may be made against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction.'

¹⁶⁶ See note 51 above. Art. 7(2) of the Statute reads: 'The Human and Peoples' Rights Section shall be competent to hear all cases relating to human and peoples' rights.'

¹⁶⁷ See note 49 above. Art. 48(1) of the Statute reads: 'An application for revision of a judgment may be made to the court only when it is based upon discovery of a new fact of such nature as to be a

Amending Merged Court Protocol and Statute confers jurisdiction on the Appellate Chamber of the International Criminal Law Section, constituted by five judges who hear revisions and appeals.¹⁶⁸ The lack of clarity on human rights appeals, and the constitution of the Appellate Chamber with only International Law jurists, has attracted criticism from African human rights observers. Viljoen argues that this is inappropriate, as the Appellate Chamber is not well versed in human rights matters on the grounds of their expertise in international criminal law, and not international human rights.¹⁶⁹ Viljoen further argues that the difference between the mandate of the Human and Peoples' Rights Court, which is one of State responsibility, and the individual criminal responsibility of the International Criminal Law Court, is incompatible. The incorporation of these two diverse functions in terms of responsibility and accountability is 'unprecedented under international law'. This argument is valid, but it is surmountable, and can be cured with an amendment to include human rights jurists as constituents in the Appellate Chamber dealing with human rights matters.

Provision is made in the proposed Draft to change the composition of the Registry drastically to support a Registrar and three Assistant Registrars. It does not, however, specify that an Assistant Registrar will be appointed to each Section of the Court, but this would be the logical reason for such appointment, and a step in the right direction. However, this proposed appointment of an Assistant Registrar to the Human and Peoples' Rights Section strengthens the independence of this Section and bodes well for the protection of human rights.

3.2.4 *The infrastructure of the Merged Court*

The Draft instrument proposes transformation of the infrastructure of the Merged Court to such a degree that it would have an impact on the Human Rights Section. The seat of the Merged Court is the same as the African Human Rights Court.¹⁷⁰ The addition of the International Criminal Law Section would require additional space, equipment, human and financial resources. The resources budgeted for the African

decisive Factor, which fact was, when the judgment was given, unknown to the court and also to the party claiming revision, provided that such ignorance was not due to negligence.'

¹⁶⁸ See note 51 above Art. 10(5) of the Statute. The Appellate Chamber of the International Criminal Law Section of the Court shall be duly constituted by five (5) judges.

¹⁶⁹ See note 75 above at p.5.

¹⁷⁰ See note 49 above Art. 25 of the Statute. The seat of the Court shall be same as the Seat of the African Court on Human and Peoples' Rights. The Seat of the Court is situated at Arusha, the United Republic of Tanzania. <http://www.african-court.org/en/> (accessed 27/02/2013).

Human Rights Court will now be shared among three instead of two Sections of the Merged Court. This has the potential to place the AU under pressure to make additional resources available under difficult financial circumstances, as discussed above. The AU assumes responsibility for the budget of the Merged Court.¹⁷¹ The financial impact on the Merged Court has been discussed in detail above.

3.2.5 *The intellectual structure of the Merged Court*

3.2.5.1 Access to the Court

A contentious issue of access to individuals to the Merged Court has been addressed in the Draft instrument by indirectly including the African Commission within its structure. The Draft Amending Merged Court Protocol and Statute confirms the complementary relationship between the Merged Court and the African Commission.¹⁷² This to some extent secures the access of individuals to the Human and Peoples' Rights Section of the Court. The Merged Court Protocol and Statute failed to make such provision, and the Draft instrument remedies this omission, and therefore strengthens the structure of the Human and Peoples' Rights Section with regard to the protection of human rights. The inclusion of the Section on the complementary relationship between the two human rights mechanisms adds weight to the protective mandate of the Human and Peoples' Rights Section. Furthermore, NGOs are eligible to submit cases to the Merged Court through the African Commission despite the fact that the African Commission may not be an organ of the AU.¹⁷³

Observers of the African Human Rights system have criticised the lack of direct access to the African Human Rights Court and the Merged Court.¹⁷⁴ Article 8(3) of the Merged Court Protocol and Statute and Article 9(3) of the Draft Amending Merged Court Protocol and Statute set the terms of direct access to individuals on a prior declaration being ratified by the Member State. The other route available for

¹⁷¹ See note 49 above. Art. 26(2) of the Statute. The budget of the Court shall be borne by the African Union.

¹⁷² See note 51 above. Art. 4 of the Protocol reads: The Court shall, in accordance with the Charter and this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights.

¹⁷³ See note 49 above. Art. 30 of the Statute reads: The following entities shall also be entitled to submit cases to the Court on any violation of a rights guaranteed by the African Charter Art. 30(b) the African Commission on Human and Peoples' Rights.

¹⁷⁴ See note 3 above du Plessis & Stone at p.540; also see note 72 above Juma at p.14–19; note 15 above Udombana at p.829–835; note 23 above Boukongou at p.488; note 1 above Viljoen & Baimu at p.266; note 23 above Mubangizi at p.150; note 75 above Viljoen at p.3; note 17 above Scaats at p.2.

individual access to the proposed Merged Court is through the African Commission. Wachira argues that as a consequence, the African Commission will remain a tribunal of first and last instance in respect of the individual cases.¹⁷⁵ Commissioner Alapini-Gansou, as quoted by Viljoen, sees the African Commission as a filter that will ensure that only those cases that need to go to the African Human Rights Court will reach the Court.¹⁷⁶ Juma argues that in the absence of declarations by State Parties, the main gateway for individuals to the Court may be the African Commission. Article 30(b) of the Merged Court Protocol and Statute makes provision for the practical application of this access to individuals, where the African Commission is entitled to submit cases to the Court. It now remains with the ACJHPR to clarify and develop its relationship with the African Commission, as it is dependent on the African Commission to submit cases to it; or alternatively, on States submitting a declaration allowing for direct access to the Court.¹⁷⁷ Direct access to the Human and Peoples Rights Section is made the responsibility of Member States. This places the onus on States to prove their commitment to the protection of human rights within their own territories and on the continent as a whole.

However, Member States, the African Commission, the African Commission on the Rights and Welfare of the Child, African Intergovernmental Organisations (AIOs) accredited to the Union or its organs, and African National Human Rights Institutions (ANHRI) are entitled to submit cases to the Human and Peoples' Rights Section.¹⁷⁸

It is important for individuals to be granted access as it is invariably individuals who are victims of human rights violations perpetrated by States. Human Rights NGOs play an important role in the protection of human rights by being a support base for these victims. They provide access to justice to victims who are not in any position financially or otherwise to take their complaints to court. They also play an important role in the promotion of human rights awareness. Given time, there exists a possibility that the AU will consider direct access by individuals to the Human and Peoples' Rights Section, as is permitted in the ECHR. This possibility is further fortified by the fact that International Criminal Law seeks to prosecute individual

¹⁷⁵ See note 23 above Wachira at p.488.

¹⁷⁶ See note 75 above Viljoen at p.245. Also see note 50 above Kane & Motala at p.439.

¹⁷⁷ See note 83 above Beigon at p.232.

¹⁷⁸ See note 49 above Art. 30 of the Statute.

violators and this could be an argument to allow individual access to the other Sections of the Court. There also exists an option that should this individual access be granted, the role of African Commissions will come under review owing to cost implications. Declarations by Member States could, on the other hand, be an acknowledgement by Member States that they accept that power lies with and in the people. This is democracy in action and a confirmation that States are committed to human rights protection.

3.2.5.2 Applicable law

From a human rights perspective there is no specific reference to any human rights law that empowers the ACJHPR in carrying out its obligations. The court is empowered to have regard to the Constitutive Act, in which reference to human rights can be found only in its preamble, objectives and principles.¹⁷⁹ It is further required to have regard to international treaties, customary law and universally accepted principles.¹⁸⁰ These catch-all provisions mean that the Court may enforce the African Charter on Human and Peoples' Rights.¹⁸¹ Viljoen and Baimu argue that inclusion of human rights in the Preamble is significant as it is an important interpretative material.¹⁸² Both the Constitutive Act and the Draft Amending Merged Court Protocol and Statute make express reference to human rights. The Draft Amending Merged Court Protocol and Statute and the Constitutive Act mention the African Charter. The fourth paragraph in the Preamble states that Member States of the African Union '[bear] in mind their commitment to promote peace, security and stability on the continent, and to protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant instruments'. Six of the 17 paragraphs of the Preamble make explicit reference to human rights. The Constitutive Act is the applicable law of human rights in terms of the provisions enshrined in its objectives. The AU is to encourage international co-operation taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;¹⁸³ promote democratic principles and institutions,

¹⁷⁹ See note 41 above Constitutive Act; also see note 1 above Viljoen&Baimu at p.246.

¹⁸⁰ See note 49 above Merged Court Statutes Art. 31.

¹⁸¹ See note 49 above Art. 31.

¹⁸² See note 1 above Viljoen&Baimu at pp.246–247. The express inclusion of human rights in the Preamble of the Act is very significant since, in terms of the Vienna Convention on the Law of Treaties of 1969, a preamble is important interpretative material.

¹⁸³ See note 41 above Art. 3(e).

popular participation and good governance;¹⁸⁴ and promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.¹⁸⁵ These objectives are enhanced in the AU principles with the right of the Union to interfere in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;¹⁸⁶ promotion of gender equality;¹⁸⁷ respect for democratic principles, human rights, the rule of law and good governance;¹⁸⁸ promotion of social justice to ensure balanced economic development;¹⁸⁹ respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;¹⁹⁰ and condemnation and rejection of unconstitutional changes of governments.¹⁹¹

The African Human Rights Court Protocol explicitly makes the African Charter its primary source of law and other relevant human rights instrument ratified by the States concerned.¹⁹² The African Charter is arguably the most important human rights instrument in Africa¹⁹³ and as such must be an integral part of the Protocol and Statute to the ACJHPR. 'The promotion and protection of human rights is a bedrock requirement for the realisation of the Charters vision of a just and peaceful world.' These words uttered by Kofi Annan, United Nations Secretary-General at the time, hold equally true for the African Charter and must take their rightful place within the AU. The AU must secure a legal base to incorporate the African Charter within its framework as mentioned earlier by acceding to the African Charter.¹⁹⁴ Gumedze argues:

Acceding to a human rights instrument by the AU will also create a binding mechanism and give essence to the AU's functional principle of respect for democratic principles, human rights, rule of law and good governance as provided

¹⁸⁴ See note 41 above Art. 3(g).

¹⁸⁵ See note 41 above Art. 3(h).

¹⁸⁶ See note 41 above Art. 4(h).

¹⁸⁷ See note 41 above Art. 4(l).

¹⁸⁸ See note 41 above Art. 4(m).

¹⁸⁹ See note 41 above Art. 4(n).

¹⁹⁰ See note 41 above Art. 4(o).

¹⁹¹ See note 41 above Art. 4(p).

¹⁹² See note 22 above Art. 7.

¹⁹³ See note 1 above Viljoen & Baimu at p.246. See also note 23 above Boukongou at p.269; note 23 above Mubangizi at p.147.

¹⁹⁴ See note 89 above Gumedze at p.150. See also note 1 above Viljoen & Baimu at p.265.

for in the Constitutive Act. It is also in this way that the responsibility to protect by the AU can be enforceable through a judicial or quasi-judicial process.¹⁹⁵

Article 34 of the Merged Court Statute provides for proceedings to be brought before the Human Rights Section. It specifically enshrines the African Charter on Human and Peoples' Rights, the Charter on the Rights on the Welfare of the Child, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and it includes in this mandate any other relevant human rights instrument ratified by the State concerned.¹⁹⁶ The Human Rights Section is mandated with jurisdiction to interpret the instruments mentioned above. These mandates, while granting the right to prosecute with regard to violations of these Treaties, do not give the African Charter and human rights law its rightful place as the applicable law. Its exclusion is a failure on the part of the AU to bring certainty to the protection of human and peoples' rights. The AU must consider an amendment to the Merged Court Statute to include the African Charter specifically as the applicable law on human and peoples' rights. Another consideration is that the AU should accede to the African Charter. These considerations would be a positive influence in the protection of human and peoples' rights as they would be grounded in the rule of law, which is not the position at present.

3.2.5.3 Judgments, decisions and implementation

The African Human Rights Court is the result of years of lobbying and continued disregard for the authority of the African Commission findings. The African Human Rights Court is empowered to make binding decisions coupled with the power to determine the extent of the reparation to be made to remedy the violation.¹⁹⁷ The Council of Ministers of the OAU/AU is instructed to monitor the execution of the judgment, and the State Party concerned is required to undertake to comply with the judgment.¹⁹⁸ Failure to comply will result in the reporting of the defaulting State Party to the Assembly.¹⁹⁹ No authority to impose a sanction is given to the Assembly. This has been remedied in the Merged Court Protocol and Statute.

Most of the contents of the clauses pertaining to findings, judgment, notification and execution of judgments have been transported from the African Human Rights

¹⁹⁵ See note 89 above Gumedze at p.150.

¹⁹⁶ See note 49 above Merged Court Statute Art. 34.

¹⁹⁷ Note 22 above African Human Rights Protocol Arts.27 and 28.

¹⁹⁸ Above Art. 29.

¹⁹⁹ Above Art. 31.

Protocol into the Merged Court Protocol and Statute. The Executive Council is ordered to be notified of the judgment and to monitor its execution.²⁰⁰ The Draft Amending Merged Court Protocol and Statute in Article 20 empowers the Rules of Court to establish principles relating to reparations to victims including restitution, compensation and rehabilitation.²⁰¹ This is an important aspect of the protection of human rights as it creates the opportunity for victims of human rights violations to regain some dignity.²⁰² Even more reassuring is that the power imputed to the ACJHPR is the binding force of its decisions on the party concerned, and non-compliance with a judgment would attract the imposition of sanctions on the violating State Party by the Assembly.²⁰³ The Assembly is empowered to impose appropriate sanctions, such as denial of transport and communication links with Member States, including measures of a political and economic nature, on Member States that fail to comply with decisions and policies of the Union.²⁰⁴ In terms of Article 35 of the Merged Court Statute, the Court is also empowered to impose provisional measures if circumstance so warrant.²⁰⁵ The decision of the Court is binding and the judgment is final. The offending State against which the judgment is given has the right of review and/or to appeal the judgment in terms of the Draft Amending Merged Court Protocol and Statute.²⁰⁶

This sub-structure is the reason for the Human Rights Court being established. The cornerstone of the Court is founded on four pillars. The first is the power to make binding decisions on violators of human rights; the second the power to order and determine appropriate compensation and reparations to those who have been aggrieved, traumatised and dehumanised through acts of violence; and the third is the power to impose sanctions on the defaulting State found guilty of human rights violations. Finally, in the implementation and monitoring of its judgments, the ACJHPR enshrines this structure within its enabling instrument and acts in concert with the political arm of the AU with regard to implementation and monitoring of the decisions and the imposition of sanctions on violating States. This sub-structure is a

²⁰⁰ Above Art.43(6).

²⁰¹ See note 51 above Art. 20 of the Statute.

²⁰² See note 49 above Art. 46(3).

²⁰³ See note 49 above Art.46(1) and (5).

²⁰⁴ See note 41 above Constitutive Act Art. 23.

²⁰⁵ See note 49 above Art. 35 of the Statute.

²⁰⁶ See note 51 above Art. 3 of the Protocol and Art.18(3) of the Statute.

vital element within the microstructure of the ACJHPR for the protection of human and peoples' rights.

3.3 The macrostructure of the Merged Court

The macrostructure of the proposed Tri-Sectional Court comprises of human rights mechanisms and institutions outside the ambit of the AU and which are not constituted as organs thereof. These mechanisms and institutions support and strengthen the microstructure of the Human and Peoples' Rights Section within the ACJHPR. The effective operation of these mechanisms will fortify the Human and Peoples' Rights Section in the promotion and protection of human rights on the African continent. The African Commission, the sub-regional community courts and the national mechanisms make up the foundational macrostructure of the African human rights system, with the ACJHPR at its helm.

3.3.1 *The African Commission*

The African Commission is a treaty-created mechanism within the African human rights system. It is not an organ of the AU. However, the potential of this mechanism has been recognised by the AU by its inclusion into the structure of the ACJHPR. This has been discussed above. While the African Commission stays outside the AU, it remains an important component of the structure of the ACJHPR and the African human rights system as a whole. Its continued operation over the years has earned the respect of African human rights observers in the protection and promotion of human and peoples' rights.

3.3.2 *The sub-regional mechanisms*

The proposed inclusion of the International Criminal Law Section in the Merged Court will no doubt shift the focus from the Human Rights Section. This is attested to by the extensive detailed emphasis on criminal law issues in the Draft Amending Merged Court Protocol and Statute. In particular, this Section of the Court extends its jurisdiction so that it becomes complementary to the National Courts and to the Courts of the Regional Economic Communities (RECs).²⁰⁷ In so doing, the International Criminal Court embraces these macro-institutions within its structure.

²⁰⁷ See note 51 above Art. 46H of the Draft Amending Merged Court Statute and Art. 3(2) of the Protocol.

This has the effect of strengthening the status of this Section of the Court and its awareness as the continent's criminal mechanism with the might of the AU at its back to make pronouncements on war crimes, genocide and crimes against humanity. The inclusion of the International Criminal Law Section within the Merged Court gives effect to the provisions of the Constitutive Act.²⁰⁸

This is where the Draft Amending Merged Court instrument fails to protect human rights: by its stark omission to include the various sub-regional community courts within the jurisdiction of the Human and Peoples' Rights Section. This has been discussed above under the Section dealing with the proliferation of courts. The Draft Amending Merged Court Protocol and Statute could propose that the same complementary jurisdiction include the Human and Peoples' Rights Section of the ACJHPR. This would alleviate the concerns raised by observers of African human rights and strengthen the structure that protects human and peoples' rights. A strong institutional linkage needs to be established between the sub-regional community courts and the ACJHPR under the framework of the AU.

3.3.3 *The national mechanisms*

The African Charter recognises that fundamental human rights stem from national and international protection.²⁰⁹ The Draft Amending Merged Court Protocol and Statute calls for the International Criminal Law Section to complement the national mechanisms on grave crimes, as mentioned above.²¹⁰ There is no such provision for the Human and Peoples' Rights Section to complement national mechanism in either the Merged Court Protocol and Statute or the Draft Amending Merged Court Protocol and Statute. The development of national human rights mechanisms and institutions is fundamental to the support of the Human and Peoples' Rights Section of the Merged Court for the promotion and protection of human rights. The United Nations recognised this importance and adopted 'Action 2', a plan to strengthen and support the promotion and protection of human rights worldwide.²¹¹ In the UN's quest to place human rights at the centre of its activities, 'Action 2' identified building of strong human rights institutions at country level as the principal objective of the UN, so as to strengthen national human rights promotion and protection. The

²⁰⁸ See note 41 above Art. 4(h) Constitutive Act Principle.

²⁰⁹ See note 4 above African Charter Preamble.

²¹⁰ See note 51 above Art. 46H of the Statute.

²¹¹ United Nations Action 2 www.un.org/events/action2/programme.html (accessed 21/12/2012).

UN identified that to ensure effective and sustainable human rights protection at national level, it is crucial to have strong institutions that operate independently and adhere to international human rights standards. In so doing, the UN recognised the following important elements of a national protection system: laws consistent with international human rights standards; effective functioning of courts, judiciary and law enforcement as well as independent human rights institutions and an ombudsman; procedures for individuals to claim their rights effectively; and good governance and accountable government and institutions that promote and protect human rights, among others. It is apparent that the strength of the Human and Peoples' Rights Section of the Tri-Sectional Court is the sum of national institutions grounded in human rights principles and guided by international norms and standards. It becomes imperative that the AU adopt a human rights-based approach which will strengthen the capacity of national human rights mechanisms and institutions to promote and protect human rights.

Africa is the largest Regional Group within the UN, with 54 Member States that constitute 28 per cent of the total number of UN Member States. Africa holds three non-permanent seats in the UN Security Council, fourteen seats in the UN Economic and Social Council, and more importantly, thirteen seats on the UN Human Rights Council.²¹² This is significant for the protection and promotion of human rights in Africa in that all States are Members of the UN and subscribe to the global principles of human rights espoused in the Universal Declaration of Human Rights. It is also important that all States, regardless of the political, economic and cultural systems, have a duty to promote and protect all human rights and fundamental freedoms.²¹³ The support and development of ANHRIs is of vital importance because these institutions have been granted the right of access to submit cases to the Human and Peoples' Rights Section of the Tri-Sectional Court. These institutions together with the national human rights courts form the base structure of the Merged Court's Human and Peoples' Rights Section.

²¹² United Nations <http://un.org/depts/DGACM/RegionalGroups.shtml> (accessed 28/02/2013).

²¹³ UN General Assembly Resolution adopted at the sixteenth session Agenda item 46 and 120 A/res/60/251.

3.3.4 *African intergovernmental organisations and NGOs*

The African Human Rights Court,²¹⁴ the Merged Court²¹⁵ and the Draft Amending Merged Court instruments enshrine the structure of the ANHRI, AIOs,²¹⁶ NGOs²¹⁷ and RECs. These organisations form the grassroots structure of the Human Rights Section of the Court, which is vital to the promotion and protection of human rights on an individual basis. These institutions, despite being at the lower rung of the structure, are the foundation of the microstructure of the Draft Amending Merged Court's Human Peoples' Rights Section. AIOs are defined as organisations with the aim of ensuring socioeconomic integration, and to which some Member States have ceded certain competences to act on their behalf, as well as sub-regional, regional or intergovernmental organisations. There are no qualifying conditions attached to AIOs regarding representation of individuals at the African Human Rights Court or at the Human and Peoples' Rights Section of the Merged Court, or at the Tri-Sectional Court's Human and Peoples' Rights Section. Individuals who are aggrieved by violations of their socioeconomic rights are not prevented from approaching the AIOs to intervene on their behalf at sub-regional, regional and international level, if their national structure fails them.

An important component has been added to the grassroots structure in the Human and Peoples' Rights Section of the Merged Court, in the style of ANHRI.²¹⁸ This is a

²¹⁴ See note 22 above Art. 5(e) and 5(3).

²¹⁵ See note 49 above Art. 30(d) and 30(f).

²¹⁶ The Merged Court Statute defines an AIO as an organisation that has been established with the aim of ensuring socio-economic integration, and to which some Member States have ceded certain competencies to act on their behalf, as well as other sub-regional, regional or inter-African Organisations.

²¹⁷ The Merged Court Statute defines NGOs as African Non-Governmental Organisations at the sub-regional, regional or inter-African levels as well as those in the Diaspora as may be defined by the Executive Council. Art. 30(f) further qualifies NGOs to be relevant with accreditation to the AU or its organs. Art. 8(f) of the Protocol required to make a declaration accepting the competence of the Court to receive case from NGOs. This qualification applies equally for the African Human Rights Court Art. 34(6).

²¹⁸ See note 49 above Merged Court Statute Art. 30(e). African National Human Rights Institutions are defined as public institutions established by a state to promote and protect human rights. NHRI are established to handle complaints, conduct research advocacy and education programmes. In some States, such as South Africa, the Constitution has provided for the establishment of an NHRI (Section 184 South African Constitution). In other States such institutions are created by legislation or by decree. The NHRIs are founded on the Paris Principles. These principles were defined at the first International workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7–9 October 1991 adopted by the Human Rights Commission Resolution 1992 and General Assembly Resolution 48/134 1993.

<http://www.nanhri.org/index.php?option=content&task=view&id=13> (accessed 17/03/2013). Forty-one of the 54 African States are members of the Network of African National Human Rights Institutions.

welcome addition as it does not require any accreditation to be eligible to submit cases to the Human Rights Section and to the Human and Peoples' Rights Section of the Tri-Sectional Court. This is a breakthrough for the promotion and protection of human rights, as individuals may be represented through these organisations, even though they may be part of the national judicial systems operating independently of the State Executive. It is vital that ANHRIs take full advantage of this opportunity and develop their infrastructure to an acceptable level of operation to receive and process individual complaints in their drive to promote and protect human rights.

The limitations placed on NGOs and individual's direct access to the Human Rights Section of the Merged Court²¹⁹ or the Human and Peoples' Rights Section of the Tri-Sectional Court²²⁰ could be removed in the future. NGOs and individuals could approach ANHRIs to represent them with regard to the Human and Peoples' Rights Section of the Merged Court. NGOs could assist individuals to gain access to the ANHRIs. The ANHRI in turn can make itself accessible to both individuals and NGOs. AIOs have access to both sub-regional and the Merged Courts, which could be advantageous to individuals who have been aggrieved by human rights violations. These three organisations are an ideal breeding ground for the promotion and protection of human rights and should be exploited to their fullest by individuals and groups of people whose human rights have been violated. The effective utilisation of these institutions could lead to the reduction of complaints reaching the continental court for relief.

3.4 Conclusion

In the final analysis it can be said that the proposed Tri-Sectional Court has the necessary structures in place for the effective functioning of the Human and Peoples' Rights Section of the Court. The inclusion of the International Criminal Law Section in the Merged Court will have an effect on the outlook of the Court, but it cannot be said that this will be detrimental for the promotion and protection of human and peoples' rights. The planning, organising and developing of a cohesive relationship between the micro- and macrostructures of the Human and Peoples' Rights Section has the potential to cause a greater awareness and impact on human rights promotion and protection on the continent. This would lead to the recognition of human and peoples' rights grounded in the knowledge that the protection thereof has the backing

²¹⁹ See note 49 above Art. 30(f) of the Statute read with Art. 8 of the Protocol.

²²⁰ See note 51 above Art. 16 of the Statute read with Art. 9(3) of the Protocol.

of a continental Human and Peoples' Rights Court with the political might of the AU in full support.

Chapter Four

CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

The proposed African Court of Justice and Human and Peoples' Rights will no doubt alter the landscape of the African Court on Human and Peoples' Rights. The African Human Rights Court will now have to live and develop within the structure of the proposed Tri-Sectional Court, alongside the General Section and the International Criminal Law Section. There is no reason to believe that the proposed Draft Amending Merged Court which will house the Human and Peoples' Rights Section will be subsumed or relegated in favour of either one of the other two Sections or both. The African Human Rights Court is the only continental court in operation as stated above. However, this does not grant it the status that it deserves, as it stands independent of the AU. The bringing of the African Human Rights Court within the fold of the AU will strengthen and give the Court the necessary political clout to be a judicial force to be reckoned with in the future, as far as the promotion and protection of human rights in the African continent are concerned.

The African Human Rights Court will maintain its integrity despite losing its status as the only continental court. It retains its core structure, for example, with the proposed appointment of a human rights Registrar and qualified human rights judges. The proposed Draft Amending Merged Court Protocol does, however, reduce the number of judges to serve the Human and Peoples' Rights Section. This does not weaken the Human and Peoples' Rights Section in anyway, or indicate that the reduction will have a detrimental effect on the capacity of the Human and Peoples' Rights Section to process the number of cases brought before it. The African Human Rights Court since having become operational in 2006 has received only 21 (twenty-one) applications on human rights violations up to November 2012.²²¹ There is no specific reason attributable for the low number of applications to the African Human Rights Court. Some African human rights observers argue that the lack of direct access to the African Human Rights Court by individuals and NGOs could be responsible for this low number of applications.²²² However, in the event that there is

²²¹ AfCHPR – Judgments and Orders: <http://www.african-court.org/en/> (accessed 27/02/2013).

²²² See note 3 above, du Plessis & Stone at p.540; also see note 71 above, Juma at p.14–19; note 15 above, Udombana at p.829–835; note 23 above, Boukongou at p.488; note 85 above, Viljoen at

a need for more judges to cope with an increase in applications, the Merged Court Statute makes provision for the appointment of judges on the recommendation of the Court.²²³

The political will of States Parties is crucial to the establishment of the Tri-Sectional Court. The intentions of State Parties to date have been clearly demonstrated by their ratification of both the African Human Rights Court Protocol and the Court of Justice Protocol into force in the face of the Protocol and Statute to the ACJHR, and more recently the Draft Amending Merged Court Protocol and Statute. If this is anything to go by, this could be construed as a vote of no confidence in the Merged Court as the ratification of the Court of Justice came after the adoption of the Protocol and Statute to the ACJHR. Alternatively, there could be a lack of understanding in that the proposed Draft Amending Merged Court Protocol and Statute poses no threat to human rights as a result of the dissolution of the African Human Rights Court. The reluctance on the part of State Parties to ratify the ACJHR may be exacerbated by the major amendments made to the Statute to the ACJHR by dividing the court into a Tri-Sectional institution.²²⁴ As noted earlier, sub-regional courts with human rights jurisdiction are operational. It stands to reason that State Parties which are members of the sub-regional treaties are subject to the human rights jurisprudence of these bodies. Member States to the African Human Rights Court (in the absence of a universal human rights court) and the ICC would be in no great hurry to ratify a protocol about which they may have misgivings. Furthermore, the issues surrounding the legality of the amendments may attribute to their reluctance to ratify the Merged Court Protocol and Statute.

The question asked by this thesis is whether the structure of the ACJHPR is the preferred judicial mechanism for the effective protection of human and peoples' rights in Africa. All indications derived from the above analysis permit the conclusion that the proposed structure of the Draft Amending Merged Court Protocol and Statute, which includes a Tri-Sectional Court, will not be detrimental to the promotion and protection of human rights on the continent. In the final analysis, time alone will determine if the structure of the court as proposed will meet emerging

p.244; note 23 above, Mubangizi at p.150; note 87 above, Viljoen at p.3; note 17 above, Sceats at p.2.

²²³ Merged Court Statute Art. 3(1): 'The Court shall consist of sixteen (16) Judges who are nationals of State Parties. Upon recommendation of the Court, the Assembly may review the number of Judges.'

²²⁴ See note 51 above Draft Amending Merged Court Protocol and Statute.

needs for the promotion and protection of human and peoples' rights on the African Continent.

4.2 Recommendations

Human security, democracy, and prosperity can only be achieved in societies where fundamental human rights are respected. Humanity will not enjoy security without development; it will not enjoy development without security; and it will not enjoy either without respect for human rights.²²⁵

The AU has to play a pivotal role in the promotion and protection of human and peoples' rights in Africa. This role must be one that is grounded in human and peoples' rights. Upholding human rights is one of the most effective ways of contributing to international security. A close relationship exists between human rights, democracy and security. The responsibility rests with each Member State to ensure that human rights and fundamental freedoms are protected for the benefit of its peoples. The AU should strive to fulfil its objective of promoting and protecting human rights by supporting and encouraging Member States to enshrine human rights into its national laws. The AU can only be as strong as the sum of its parts, and as such, Member States must take responsibility to protect their citizens vigorously against human rights violations and to take the lead in protection by enacting measures within their legislatures. Recalcitrant State Parties of human rights violations must be dealt with by the AU by way of imposing sanctions such as suspension of membership to the AU, despite the fact that States may not be Parties to the African Human Rights Court instrument.

The transition process must be addressed to accommodate the Merged Court with regard to pending cases and appointed judges in order to ensure continuation and ensure that pending matters are finalised in terms of the African Human Rights Court in the areas from which they emanate.

The Draft Amending Merged Court Protocol and Statute must consider the inclusion of human rights judges to sit in the Appeal Court.

Clarity must be given in the Court Rules to the appointment of the assistant registrars in order to direct specifically that each Section must have its own Registrar. The AU

²²⁵ Benita Ferrero-Walder, EU Commissioner for External Relations and Neighborhood Policy, quoted in *EUFOCUS* May 2009. See note 178 above.

must not discount the effectiveness of advisory decisions of the Court in bringing States Parties to change and/or enhance their human rights laws. The Rules of Court may address this issue by granting either direct access to advisory services provided by the Court, or indirectly through the African Commissions to State Parties.

The AU must engage with State Parties that have adopted a constitution which enshrines human rights to declare that their citizens and NGOs have direct access to submit complaints to the Human and Peoples' Rights Section. Secondly, the AU must promote human rights where State Parties have not formalised human rights, and encourage them to declare individual access to the Human and Peoples' Rights Section of the ACJHPR.

A commitment to the promotion and protection of human and peoples' rights will be positively demonstrated by the AU's acceding to the African Charter and its inclusion as the applicable law on human and peoples' rights.

The ACJHPR must endorse its complementarity jurisdiction clearly to include sub-regional economic community judicial mechanisms that have human rights jurisdiction.

There is not enough discourse available on the merger of the two courts. The AU should allow Member States a reasonable time frame to assimilate and digest the ramifications of this decision to merge the two courts. The political will of both the AU and African States remains to be harnessed to protect and promote human rights.

However, during the interim period of uncertainty, the African Human Rights Court must continue to be supported by the AU to dispel any misgivings about its status as a judicial mechanism operating outside the realm of the AU. The African Human Rights Court must be recognised by the sub-regional courts as the appeals court on human rights issues. Furthermore, African States should be encouraged to include the African Charter as an integral part of their domestic human rights laws, and the jurisprudence of the African Human Rights Court should not be treated as foreign law, and should be recognised by all African Member States as part of their jurisprudence.

The AU must continue with its mandate to establish the Court of Justice which embraces a General Section and the International Criminal Law Section, as provided for in the Constitutive Act that was accepted, adopted and ratified by all African

States in 2001, so that the African Human Rights Court may continue to develop during the transition period.²²⁶

ANHRI must be encouraged to play a meaningful role within the Member States, sub-regionally and at the African Human Rights Court, not only by bringing complaints to the judiciary, but also by promoting and educating citizens on human rights. ANHRIs must become accessible to individuals and NGOs in order to bring complaints of human rights violations to the Merged Court when national mechanisms are unable to provide protection of peoples' rights.

The AU must adopt a human rights-based approach that will filter into regional and national legislation and judicial structures.

²²⁶ The newest African State is the Republic of South Sudan.

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